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Figure 1 consists of two line graphs. The left graph plots 'Growth rate (log CFU/h)' on the y-axis (0 to 1.0) against 'Temperature (°C)' on the x-axis (20 to 45). It shows two data series: a control (open circles) and a mutant (filled circles). Both series show a peak in growth rate around 37°C, with the control reaching approximately 0.9 log CFU/h and the mutant reaching approximately 0.8 log CFU/h. The right graph plots 'Growth rate (log CFU/h)' on the y-axis (0 to 1.0) against 'Temperature (°C)' on the x-axis (20 to 45). It shows two data series: a control (open circles) and a mutant (filled circles). Both series show a peak in growth rate around 37°C, with the control reaching approximately 0.9 log CFU/h and the mutant reaching approximately 0.8 log CFU/h.

The figure consists of two side-by-side line graphs. Both graphs have 'Rate of reaction' on the y-axis and 'Temperature' on the x-axis. The left graph shows a curve that starts at a low rate at low temperatures and rises very steeply as temperature increases, indicating a high activation energy. The right graph shows a similar curve, but it rises more gradually with temperature, indicating a lower activation energy.

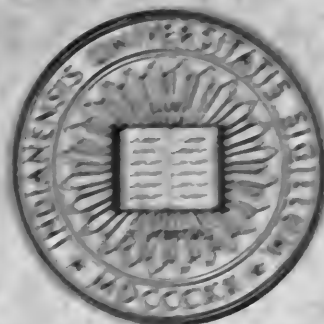
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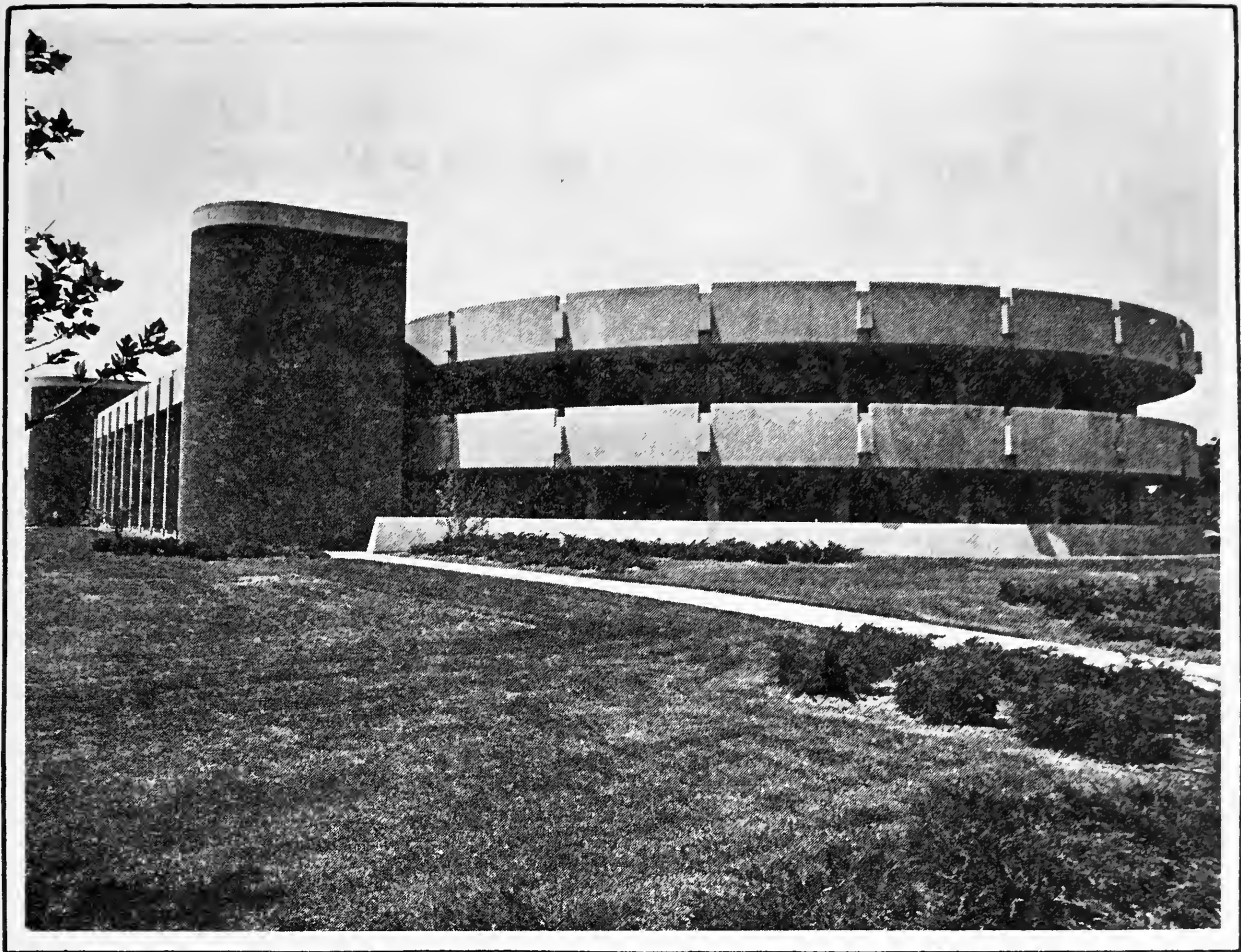
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* * * * *

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Forward—1985 Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its annual Survey of Recent Developments in Indiana Law. The Survey covers the period from June 1, 1984, to May 31, 1985, with deviations from this period when necessary to treat the developments adequately.

Since the *Law Review* began publishing a Survey thirteen years ago, the Survey has grown in importance to members of the bench and bar as well as to law students and faculty. The current Survey reflects some changes from the format of previous issues. It no longer attempts to chronicle all the developments in a subject area in a single article. Other publications perform that function in a format that better ensures timely dissemination. Instead, the Board of Editors has decided to present a more in-depth discussion of the most significant developments in Indiana law. We believe that it is incumbent on a law review to provide this more detailed analysis and that this format will better serve the readers of the Survey. We welcome your comments and suggestions in this regard.

Board of Editors
Indiana Law Review

Erratum: The name of the student author of the note appearing at page 937 of Volume 18 was inadvertently omitted. That author is Jerry A. Garau.

Indiana Law Review

Volume 19

1986

Number 1

Erhardt v. State: Nude Dancing Stripped of First Amendment Protection

JEFFREY A. BEEN*

I. INTRODUCTION

Indiana's Public Indecency Statute¹ continues to spawn paroxysmal majority opinions and dissents in a seemingly futile judicial attempt to narrow the legislative prohibition against public nudity. Once limited to the Indiana Supreme Court,² the divisive opinions concerning the constitutional parameters of dancing nude in public now pervade the Indiana Courts of Appeals.³ The differing treatment of nude dancing by Indiana

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¹IND. CODE § 35-45-4-1 (Supp. 1985) provides:

- (a) A person who knowingly or intentionally, in a public place:
 - (1) Engages in sexual intercourse;
 - (2) Engages in deviate sexual conduct;
 - (3) Appears in a state of nudity;
 - (4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
- (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
- (c) A person who, in a place other than a public place, with the intent to be seen by persons other than invitees and occupants of that place:
 - (1) Engages in sexual intercourse;
 - (2) Engages in deviant sexual conduct; or
 - (3) Fondles the genitals of himself or another person; where he can be seen by persons other than the invitees and occupants of that place commits indecent exposure, a class C misdemeanor.

²See *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979).

³*E.g.*, *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984) (nude dancing in adult bookstore violated Public Indecency Statute). *Cf.* *Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984) (dance contestant in "Miss Erotica" contest did not violate Public Indecency

Courts of Appeals marks a continuing uncertainty as to the first amendment⁴ protection afforded this "expressive conduct."⁵

Erhardt v. State,⁶ the most recent decision reflecting this conflict in the appellate courts, generated a majority opinion and a dissent in the Indiana Court of Appeals⁷ and a majority opinion and two dissents in the Indiana Supreme Court.⁸ From these opinions only a few certainties can be gleaned: 1) public nudity is entitled to "some protection," although the nature of the nudity protected and the degree of protection remains uncertain;⁹ 2) nude dancing is devoid of any expressive content meriting constitutional protection;¹⁰ and 3) nude dancing need not be lewd nor obscene to be prohibited by the public indecency statute.¹¹ Perhaps no greater idea can be culled from the *Erhardt* opinions than Justice DeBruler's call for a "remand to the legislature to make plain through its own added language what societal problems it perceives to exist in this area at this point in history, and to draw the line between legitimate public nudity and criminal public nudity."¹²

Although the Indiana Supreme Court majority in *State v. Baysinger*¹³ postulated that the judiciary could cure or narrow whatever overbreadth

Statute when she danced nude), *rev'd*, 468 N.E.2d 224 (Ind. 1984). *See also infra* text accompanying note 80.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The first amendment applies to the states through the fourteenth amendment. *Bridges v. California*, 314 U.S. 252 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵Whether nude dancing is merely conduct or expression of ideas or a hybrid of these two appears to be central to the Indiana Supreme Court's analysis. The court has refused to grant nude dancing the presumption that the expression of ideas may be involved. Instead, the court distinguishes between nude *conduct* and protected *communication*. *See infra* notes 15 and 102 and accompanying text.

⁶468 N.E.2d 224 (Ind. 1984).

⁷463 N.E.2d 1121 (Ind. Ct. App.), *rev'd*, 468 N.E.2d 224 (Ind. 1984) (Judge Miller wrote the opinion of the court of appeals and Judge Young concurred. Presiding Judge Conover dissented with an opinion.).

⁸468 N.E.2d 224. Chief Justice Givan wrote the majority opinion in which Justices Prentice and Pivarnik concurred. Justices DeBruler and Hunter dissented with separate opinions. Justices DeBruler and Hunter have continued their objection to the statute's overbreadth since their dissent in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979). *See infra* text accompanying note 88.

⁹*Erhardt v. State*, 463 N.E.2d at 1122-23 (citing *State v. Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587 (1979)), *rev'd*, 468 N.E.2d 224 (1984).

¹⁰*Erhardt*, 468 N.E.2d 224. *See also State v. Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587; *Adams v. State*, 461 N.E.2d at 742.

¹¹468 N.E.2d 224 (Ind. 1984).

¹²*Id.* at 226.

¹³272 Ind. 236, 397 N.E.2d 580.

existed in the Indiana Public Indecency Statute,¹⁴ *Erhardt* reflects a continuing reluctance by the court to narrow the statute's proscription to provide for protective expression. Instead, the majority accepts a specious distinction between speech and conduct in first amendment analysis¹⁵ and applies it to nude dancing so to penalize apparently all public nude conduct unaccompanied by Shakespearean verse or MacDermot score.¹⁶ A review of the federal decisions and treatment of this issue by other states reveals that the Indiana Public Indecency Statute is incurably overbroad in regulating expression protected by the first amendment.

II. THE BELLWETHER, THE WEATHERVANE, AND THE STORM

A. *The Bellwether*: State v. Baysinger

In 1980, the Indiana Supreme Court first considered the constitutionality of the Indiana Public Indecency Statute. In *State v. Baysinger*,¹⁷ the defendants, dancers and owners or operators of taverns and bars which offered nude dancing as entertainment, challenged Indiana's Public Indecency Statute as unconstitutionally vague and overbroad. In a decision which has twice been dismissed for lack of a federal question by the United States Supreme Court,¹⁸ the Indiana Supreme Court found the statute sufficiently drawn that "'men of common intelligence [need not] necessarily guess at its meaning or differ as to its application.'" ¹⁹ Moreover, the court concluded that nude dancing in the setting in which it occurred — the barroom or tavern — is merely conduct, not speech, and as such, does not rise to the level of a first amendment claim.²⁰

The majority in *Baysinger* relied on *California v. LaRue* ²¹ to support the view that the state has broad authority to control the sale of

¹⁴*Id.* at 247, 397 N.E.2d at 587.

¹⁵The Supreme Court has been unable to formulate "a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan, J., concurring). See generally Ely, *Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975).

¹⁶Galt MacDermot composed the score for the musical "Hair."

¹⁷272 Ind. 236, 397 N.E.2d 580.

¹⁸The *Baysinger* decision was a consolidation of several causes with similar appealable issues. After the Indiana Supreme Court's ruling, certain parties continued their appeal until dismissed by the United States Supreme Court. See 449 U.S. 806 (1980); 446 U.S. 931 (1980).

¹⁹272 Ind. at 238, 397 N.E.2d at 582. The defendants contended that the statute was vague because the word "public" was undefined. Relying upon early case law definitions, the Indiana Supreme Court concluded that "public place" is sufficiently defined as a place "'accessible to the public'" and "'where the public is invited and are free to go upon special or implied invitation.'" *Id.* (quoting *Peachy v. Boswell*, 240 Ind. 604, 621-22, 167 N.E.2d 48, 56-57 (1960)).

²⁰272 Ind. at 247, 397 N.E.2d at 587.

²¹409 U.S. 109 (1972).

intoxicating liquors under the twenty-first amendment and to proscribe some acts which are not obscene and possibly within the limits of the first and fourteenth amendments' protection of freedom of expression.²² The defendants' challenge in *Baysinger*, however, unlike the constitutional challenges raised in *LaRue* and in other states at that time over nudity regulations,²³ was directed to a statute which was a "pure" regulation of nudity. The Indiana statute is not limited in its application to establishments where alcoholic beverages are served, nor is it a regulation of nudity by zoning ordinances. The statute is a pure regulation in the sense it proscribes nudity "in a public place."²⁴

The *Baysinger* majority acknowledged case law in other jurisdictions holding that the regulation of nude dancing through public indecency statutes or ordinances is unconstitutional unless the laws are tied to the regulation of alcoholic beverages.²⁵ Nonetheless, the majority supported its decision by classifying nude dancing as conduct unrelated to the expression of ideas. The court reasoned that since there is no right to appear nude in public, the statute did not violate any protective freedom.²⁶

Justices Hunter and DeBruler dissented with separate opinions and emphasized the reach of the statute into areas clearly protected by the first amendment.²⁷ Productions involving nudity for the use of educational purposes, as well as other presumably legitimate entertainment purposes, could be prohibited under the statute.²⁸ The only circumstance in which the United States Supreme Court had allowed a ban on nude dancing

²²*Id.* In *California v. LaRue*, the holders of liquor licenses challenged the constitutionality of regulations issued by the Alcoholic Beverage Control agency prohibiting explicitly sexual live entertainment in bars. The Supreme Court held the states have broad latitude under the twenty-first amendment to control the manner and circumstances under which liquor may be dispensed.

²³*See, e.g.,* *Blatnik Co. v. Ketola*, 587 F.2d 379 (8th Cir. 1978); *Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280 (1980); *Seattle v. Hinkley*, 83 Wash. 2d 205, 517 P.2d 595 (1973).

²⁴*See supra* note 1.

²⁵272 Ind. at 244, 397 N.E.2d at 585 (citing *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d 257, 368 N.E.2d 589 (1977); *New York Topless Bar and Dancers Assoc. v. New York State Liquor Auth.*, 91 Misc. 2d 780, 398 N.Y.S.2d 637 (N.Y. Sup. Ct. 1977); *People v. Nixon*, 88 Misc. 2d 913, 390 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976)).

²⁶272 Ind. at 247, 397 N.E.2d at 587.

²⁷*Id.* at 248-51, 397 N.E.2d at 587-89 (Hunter, DeBruler, JJ., dissenting).

²⁸*Id.* at 249, 397 N.E.2d at 588 (DeBruler, J., dissenting) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972); *Schacht v. United States*, 398 U.S. 58 (1970)). Justice Givan, who concurred with the majority opinion in *Baysinger*, later wrote in *Sedelbauer v. State*, 428 N.E.2d 206 (Ind. 1981), that "a nude model may be presented to an art class to aid instruction of the students as to how to depict the nude human form. The model may be presented in a wholly acceptable manner and not be considered as lewd or obscene." *Id.* at 208.

was when a state included the ban as part of a liquor license program.²⁹ For that reason, the dissenting justices found the statute swept within its ambit protected speech or expression and was therefore unconstitutionally overbroad.³⁰

*B. The Weathervane: How Strong is the Implication
that Nude Dancing is Protected "Expression"?*

The majority's opinion in *Baysinger*, that nude dancing is nothing more than "conduct" and not entitled to first amendment protection, is not unique. In the early 1970's several courts similarly classified nude dancing as mere conduct without a communicative element.³¹ *Crownover v. Musick*,³² the most notable of these, was cited by the majority in *Baysinger* to support the view that when nudity occurs as a public act unrelated to motion pictures and theatrical productions, the nudity is merely conduct and subject to state regulation.³³ In *Crownover*, the Supreme Court of California determined that ordinances regulating nudity in establishments serving food and liquor were not unconstitutionally overbroad. The court held the ordinance did not prohibit speech, expression, or entertainment. The ordinance merely directed that the entertainer could not appear with genitals or breasts exposed.³⁴ The court reasoned that the ordinance proscribed no more than was necessary to ban the nudity which was deemed harmful to the public's welfare or morals.³⁵ The *Crownover* court assumed for the purposes of argument, however,

²⁹272 Ind. at 251, 397 N.E.2d at 589 (citing *California v. LaRue*, 409 U.S. 109 (1972)).

³⁰272 Ind. at 248-51, 397 N.E.2d at 587-89 (Hunter, DeBruler, JJ., dissenting).

³¹See *Jones v. Birmingham*, 45 Ala. App. 86, 224 So. 2d 922 (1970); *Yauch v. State*, 109 Ariz. 576, 514 P.2d 709 (1973); *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973); *Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); *Hoffman v. Carson*, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971); *People v. Moreira*, 70 Misc. 2d 68, 333 N.Y.S.2d 215 (N.Y. Dist. Ct. 1972); *Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); *Wayside Restaurant, Inc. v. Virginia Beach*, 215 Va. 231, 208 S.E.2d 51 (1974); *Seattle v. Marshall*, 83 Wash. 2d 665, 521 P.2d 793, *cert. denied*, 419 U.S. 1023 (1974); *State v. Maker*, 48 Wis. 2d 612, 180 N.W.2d 707 (1970), *cert. denied*, 401 U.S. 1013 (1971).

³²9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). The California Supreme Court later overruled *Crownover* in *Morris v. Municipal Court*, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982).

³³272 Ind. at 244, 397 N.E.2d at 585.

³⁴9 Cal. 3d at 418, 509 P.2d at 505, 107 Cal. Rptr. at 689. The *Crownover* court overruled earlier California case law which specifically found that nude entertainment was communicative and entitled to prima facie first amendment protection unless judged to be obscene. See *In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

³⁵9 Cal. 3d at 428, 509 P.2d at 512, 107 Cal. Rptr. at 696.

that in some instances "a communicative element" might exist³⁶ which would invoke the four-fold test of *United States v. O'Brien*.³⁷ In applying the *O'Brien* test³⁸ to the ordinance, the court concluded that: 1) the governmental entity had the inherent power to regulate nude conduct in bars, restaurants, and other public places;³⁹ 2) the ordinance furthered an important or substantial interest in promoting public morals;⁴⁰ 3) the ordinance regulating nude conduct was aimed at conduct, not speech;⁴¹ and 4) the ordinance imposed no more restriction on first amendment freedom of speech and expression than was essential to the furtherance of important or substantial governmental interests.⁴² Thus, the *Crownover* court was satisfied that even if the nude dancing contained some communicative element involving first amendment protection, the ordinance was constitutionally tailored to serve a legitimate interest.⁴³

The *Crownover* analysis was not unlike the reasoning appearing in several decisions at that time.⁴⁴ Little consideration was given to whether nude dancing contained an expressive element deserving first amendment protection. At best it was considered bacchanal revelry or a sales gimmick occurring in a tawdry atmosphere blighting the neighborhood, if not the entire community.⁴⁵ Regulation of this "conduct" was permissible either as incidental to the state's regulation under the twenty-first amendment or the state's interest in protecting public morals.⁴⁶

By the mid 1970's, however, the courts recognized that statutes regulating public nudity violated the first amendment if not limited to

³⁶*Id.* at 426-27, 509 P.2d at 511, 107 Cal. Rptr. at 695.

³⁷391 U.S. 367 (1968).

³⁸The Supreme Court developed a test in *O'Brien* to be applied when speech and nonspeech elements are combined in the same course of conduct. The government regulation must be within the constitutional power of the government and must further an important or substantial governmental interest. The regulation must be unrelated to the suppression of free expression. The incidental restriction on first amendment freedoms must be no greater than is essential to further the governmental interest. 391 U.S. at 376-77.

³⁹9 Cal. 3d at 427, 509 P.2d at 511, 107 Cal. Rptr. at 695.

⁴⁰*Id.* at 427, 509 P.2d at 511-12, 107 Cal. Rptr. at 695-96. The court observed: "[W]e cannot say that a 'topless' female or 'bottomless' or nude person of either sex in a public place or a place open to the public is socially commonplace or has the support of a societal consensus." *Id.* at 427, 509 P.2d at 512, 107 Cal. Rptr. at 696. (citations omitted).

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*See, e.g.,* Hoffman v. Carson, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971); Brandon Shores, Inc. v. Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S.2d 957 (1971); Portland v. Derrington, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); State v. Maker, 48 Wis. 2d 612, 180 N.W.2d 707 (1970), *cert. denied*, 401 U.S. 1013 (1971).

⁴⁵9 Cal. 3d at 426, 509 P.2d at 511, 107 Cal. Rptr. at 695.

⁴⁶*See supra* note 44.

places dispensing alcoholic beverages.⁴⁷ Although these decisions were commonly marked by dissent, the majority of the justices of these courts found dicta in United States Supreme Court decisions persuasive in establishing an inference that some public nudity — even the customary barroom type of nude dancing — involved “the barest minimum of protected expression” and statutes prohibiting this nudity were unconstitutional.⁴⁸ Although the Supreme Court alluded to the possible extension of first amendment protection to nude dancing in *LaRue*,⁴⁹ not until *Doran v. Salem Inn, Inc.*⁵⁰ did there emerge a strong implication that the United States Supreme Court would view nude dancing as expression deserving first amendment protection. In *Doran*, a preliminary injunction was issued to enjoin the enforcement of an ordinance of the town of North Hempstead, New York, which banned topless performances in all public places.⁵¹ The Supreme Court sustained the preliminary injunction.⁵² The court distinguished *LaRue*, finding the state’s interest in regulating the sale of liquors in *LaRue* did not apply in *Doran* where the ordinance proscribed nudity in many other establishments as well.⁵³ Justice Rehnquist, writing for the Court, noted that the district court correctly observed that the local ordinance not only prohibited topless dancing in bars, but also prohibited any female from appearing in “any public place” with uncovered breasts. “Any public place” could include the theater, the town hall, the opera house, as well as a public market place, street, or any place of assembly indoors or outdoors. Thus, this ordinance would prohibit the performance of the “Ballet Africains” and a number of other works of unquestionable artistic and socially redeeming significance.⁵⁴

Subsequent Supreme Court decisions strengthened the implication that nude dancing was presumptively afforded constitutional protection; however, the constitutional protection could be counterbalanced by a

⁴⁷See, e.g., *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1048-50 (2d Cir. 1975); *Starshock, Inc. v. Shusted*, 493 F.2d 1401 (3d Cir. 1974); *Saxe v. Brennan*, 416 F. Supp. 892, 894-95 (E.D. Wis.), *aff’d*, 544 F.2d 521 (7th Cir. 1976); *Attwood v. Purcell*, 402 F. Supp. 231, 236 (D. Ariz. 1975); *Koppinger v. Fairmont*, 311 Minn. 186, 248 N.W.2d 708, 715-16 (1976); *People v. Nixon*, 88 Misc. 2d 913, 390 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976).

⁴⁸*Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

⁴⁹Justice Rehnquist, writing for the Court, stated, “We do not disagree with the . . . determination that the regulations [prohibiting nude entertainment in bars and other establishments licensed to dispense liquor by the drink] on their face would proscribe some forms of visual presentations that would not be found obscene under *Roth* [v. United States, 354 U.S. 476 (1957)] and subsequent decisions of this Court.” 409 U.S. at 116.

⁵⁰422 U.S. 922.

⁵¹*Id.* at 932.

⁵²*Id.* at 934.

⁵³*Id.* at 933.

⁵⁴*Id.* (citing *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478, 483 (E.D.N.Y. 1973)).

legitimate state interest. In *Schad v. Borough of Mount Ephraim*,⁵⁵ a zoning ordinance excluded from the borough all live entertainment, including nude dancing.⁵⁶ The United States Supreme Court ruled the ordinance unconstitutional and observed:

Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.⁵⁷

Most recently, in *New York State Liquor Authority v. Bellanca*,⁵⁸ the Court noted that the first amendment protection which may be presumptively afforded to nude dancing may be overcome by the state's exercise of broad powers arising under the twenty-first amendment.⁵⁹ Language emanating from the Supreme Court on nude dancing has been consistently rooted in decisions attacking zoning ordinances, as in *Schad*, or alcoholic beverage regulations, as in *Bellanca*. Thus, the Court has never directly addressed the first amendment implications of nude dancing. Justice Stevens, dissenting in *Bellanca*, noted: "Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the first amendment, the Court has never directly confronted the question."⁶⁰

Nonetheless, the implication of the Supreme Court that nude dancing is a form of expressive activity protected by the first amendment is quite strong. The extensive treatment in *LaRue*, *Schad*, and *Bellanca* concerning the distinction between nude dancing occurring in an establishment which serves alcohol and in an establishment which does not would be pointless if nude entertainment were not entitled to a first amendment protection in either establishment.⁶¹ Lower courts have determined the implication to be so strong that decisions resting upon a finding that nude dancing

⁵⁵452 U.S. 61 (1981).

⁵⁶*Id.* at 63.

⁵⁷*Id.* at 65-66 (citations omitted).

⁵⁸452 U.S. 714.

⁵⁹*Id.* at 718.

⁶⁰*Id.* at 718-19.

⁶¹See *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, 32 Cal. 3d 553, 564 n.10, 652 P.2d 51, 57 n.10, 186 Cal. Rptr. 494, 500 n.10 (1982).

constitutes merely conduct are being reevaluated.⁶² The California Supreme Court reevaluated its holding in *Crownover* and confessed that its decision that nude dancing was not entitled to first amendment protection could not stand in view of these later decisions.⁶³ The modern trend has been to strike regulations of public nudity and nude dancing as unconstitutional unless the ban is necessitated by a legitimate state interest and the regulation is narrowly drawn to serve that end.⁶⁴ Where nude dancing occurs in an establishment that sells alcoholic beverages, the courts defer to the states' broad power to regulate the sale of liquor and do not quarrel with the wisdom of the legislature in prohibiting the nudity.⁶⁵ However, when the prohibition extends beyond the reach of the twenty-first amendment to encompass an establishment which does not serve liquor, the courts will scrutinize the regulation to discover the legitimate state interest advanced.⁶⁶ In the absence of a legitimate state interest, the nude conduct must be permitted unless obscene.⁶⁷

C. *The Storm: Erhardt v. State*

At the time the Indiana Supreme Court decided *Baysinger*, the court did not have the advantage of the dicta in *Schad* and *Bellanca* which solidified the implication that nude dancing is deserving of some first amendment protection. However, the trend since 1975 and the United States Supreme Court's suggestion in *Doran* are clearly contrary to the Indiana Supreme Court's holding that nude dancing is merely conduct. In reaching its decision in *Baysinger*, the majority rejected the proposition that the dicta in *Doran* was persuasive on this issue.⁶⁸ Additionally, the majority eschewed those decisions from other jurisdictions that have held that regulations of nude dancing were overbroad unless promulgated as incidental to the states' power under the twenty-first amendment or tailored to serve the states' legitimate interest.⁶⁹

⁶²See, e.g., *Morris*, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982).

⁶³*Id.*

⁶⁴See *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981); *Mickens v. Kodiak*, 640 P.2d 818 (Alaska 1982); *Trombetta v. Mayor & Comm'rs of Atlantic City*, 181 N.J. Super. 203, 436 A.2d 1349 (1981); *People v. Wehnke*, 107 Misc. 2d 881, 436 N.Y.S.2d 137 (1981).

⁶⁵See, e.g., *City of Miami Springs v. J.J.T., Inc.*, 437 So. 2d 200 (Fla. Dist. Ct. App. 1983); *Blau-Par Corp. v. New York State Liquor Auth.*, 106 App. Div. 2d 503, 482 N.Y.S.2d 841 (1984); *Highway Tavern Corp. v. McLaughlin*, 105 App. Div. 2d 122, 483 N.Y.S.2d 323 (1984); *Pennsylvania Liquor Control Bd. v. J.P.W.G. Inc.*, 489 A.2d 992 (Pa. Commw. Ct. 1985).

⁶⁶See *supra* note 64.

⁶⁷See, e.g., *Cabaret Enter., Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978).

⁶⁸272 Ind. at 243, 397 N.E.2d at 584.

⁶⁹*Id.* at 244, 397 N.E.2d at 585.

When later United States Supreme Court decisions added weight to this previously established implication — that nude dancing may be entitled to some first amendment protection — and lower courts began reversing their positions,⁷⁰ the majority's rationale and support in *Baysinger* became increasingly suspect. Not surprisingly, when the Indiana Court of Appeals had the opportunity in 1984, in *Erhardt v. State*,⁷¹ to review the application of the Indiana Public Indecency Statute to nude dancing, the court of appeals concluded that nude dancing performed in an enclosed theater for the entertainment of the paying spectators is presumptively protected as expression under the first amendment.⁷² The Indiana Supreme Court, however, in a five-paragraph decision, set aside the opinion of the court of appeals and reaffirmed its holding in *Baysinger* that nude dancing is not entitled to constitutional protection.⁷³

In *Erhardt*, the defendant was one of eight contestants in a "Miss Erotica of Fort Wayne Contest." The competition, which was open to spectators eighteen years of age or older who paid an admission fee, consisted of several parts, including a question and answer segment, a bathing suit competition, and a dance competition. During the defendant's dance competition, the defendant removed her short negligee and panties and completed the performance using a G-string and scotch tape criss-crossed over her nipples.⁷⁴ The defendant was charged with and convicted of violating Indiana's Public Indecency Statute. Erhardt appealed her conviction, challenging the sufficiency of the evidence to support her conviction under the statute.⁷⁵

The Indiana Court of Appeals noted that the Indiana Supreme Court had hinted in *Baysinger* that courts may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection when the communication of ideas is involved.⁷⁶ Thus, according to the court of appeals, not all nudity is per se unlawful and the statute has a narrower scope than its language suggests. When the nudity is not per se unlawful, the applicable standard is Indiana Code section 35-30-10.1-1 which prohibits, among other things, obscene performances.⁷⁷ The court of appeals concluded that the evidence presented against Erhardt established that Erhardt had performed a dance pre-

⁷⁰See *supra* notes 62, 65.

⁷¹463 N.E.2d 1121.

⁷²*Id.* at 1126.

⁷³468 N.E.2d 224.

⁷⁴463 N.E.2d at 1122.

⁷⁵*Id.*

⁷⁶463 N.E.2d at 1123 (citing *Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587).

⁷⁷IND. CODE § 35-30-10.1-1 (1982). Indiana's Obscenity Statute was repealed in 1983. The current version is IND. CODE § 35-49-1-1 (Supp. 1985).

sumptively entitled to first amendment protection.⁷⁸ Furthermore, no evidence was presented to suggest the dance was lewd or obscene so as to be prohibited by the obscenity statute.⁷⁹

The conclusion in *Erhardt* placed the fourth district court of appeals in conflict with the third district court of appeals which had held, in *Adims v. State*,⁸⁰ that nude dancing in an adult bookstore atmosphere was punishable under the Public Indecency Statute. In *Adims*, patrons dropped twenty-five cents into a timing machine to watch the dancing. Judge Miller, writing for the majority in *Erhardt*, distinguished *Adims* on the assumption that the third district had apparently considered the adult bookstore setting an inappropriate theatrical setting to which to extend first amendment protection.⁸¹ Presumably, because the dancing in *Erhardt* occurred in a different setting and within a "contest" context, the court of appeals found sufficient "theatrical presentation" or "communication of ideas" to warrant first amendment protection.

Judge Conover, dissenting in *Erhardt*, found sufficient evidence to support the conviction.⁸² Erhardt had appeared nude in a public place as prohibited under the statute; therefore, no further inquiry was necessary.⁸³ Judge Conover's dissent was adopted by the Indiana Supreme Court on transfer in every respect.⁸⁴ The Indiana Supreme Court similarly found Erhardt's nudity to be specifically prohibited by the statute.⁸⁵ The court went on to note that the Public Indecency Statute is constitutional and nude dancing need not be lewd nor obscene in order to be prohibited.⁸⁶ The evidence is sufficient if it establishes a defendant has appeared nude in violation of the statute.⁸⁷

Continuing their objection to Indiana's indecency statute, Justices DeBruler and Hunter dissented from the majority's curt discussion of the statute's application to nude dancing.⁸⁸ The justices observed that *Schad* and *Doran* provide strong support for the view that nude dancing upon a stage of a theater is protected against state restriction unless the dancing is obscence.⁸⁹

⁷⁸463 N.E.2d at 1126.

⁷⁹*Id.*

⁸⁰461 N.E.2d 740 (Ind. Ct. App. 1984).

⁸¹463 N.E.2d at 1125.

⁸²463 N.E.2d at 1126-27 (Conover, J., dissenting).

⁸³*Id.* Justice Conover also dissented from the majority's decision because he found the defendant had waived a constitutional challenge to the statute by failing to file a motion to dismiss prior to arraignment. *Id.* (citing IND. CODE § 35-3.1-1-4(b) (1982)).

⁸⁴468 N.E.2d 224. Although the Indiana Supreme Court apparently adopted Justice Conover's position that the constitutional challenge was inadequately preserved, the court briefly addressed the merits of the challenge. See *infra* text accompanying notes 85-87.

⁸⁵468 N.E.2d at 225.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸468 N.E.2d at 225-26 (Hunter, DeBruler, JJ., dissenting).

⁸⁹*Id.*

III. A COMMON GROUND: REMEDIES FOR THE OVERBREADTH

Although it appears that several of the justices of the Indiana appellate courts have reached an impasse concerning the first amendment protection to be afforded nude dancing, the justices share one basic premise: not all nude conduct in public can be prohibited.⁹⁰ The United States Constitution protects the individual's freedom of expression and when the nude conduct is inextricably tied to the expression, the nudity may not be prohibited absent a legitimate interest.⁹¹ If developed fully, this premise should permit at least the presumption that nude dancing is protected expression, although the dancing may be subject to regulation if the state demonstrates a substantial interest.⁹²

All the justices on the Indiana Supreme Court apparently recognize that a ban on all public nudity is constitutionally impermissible.⁹³ Certain nudity provides an instructional purpose, such as a nude model in an art class,⁹⁴ or cultural enlightenment, such as "Ballet Africains," or entertainment, such as the dramatic works "Equus" or "Bent."⁹⁵ Banning nudity as it occurs in these instances treads heavily on first amendment rights.⁹⁶ Clearly, the Indiana Public Indecency Statute cannot survive unless its broad language is narrowed to except nudity when it occurs as protected expression. The Indiana Supreme Court has suggested that the court will judicially narrow the statute's proscription upon proper challenge, but the court refuses to accord nude dancing, in any context, the presumption of protected expression.⁹⁷ Such a refusal not only ignores the persuasive dicta from the United States Supreme Court's decisions that nude dancing may be entitled to protection, but also denigrates the history of dance as a form of expression.

⁹⁰Justices Hunter and DeBruler have subscribed to this position since their dissent in *Baysinger*, 272 Ind. 248-51, 397 N.E.2d 587-89. Justice Pivarnik, writing the majority opinion in *Baysinger* in which Chief Justice Givan and Justice Prentice concurred, noted that courts must tolerate some nudity as a part of some larger form of expression meriting protection. *Id.* at 247, 397 N.E.2d at 587. Note, however, that Justices Hunter and Prentice have retired from the court.

⁹¹*See, e.g.,* Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981).

⁹²*See, e.g.,* Grand Faloona Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982).

⁹³*See supra* note 90.

⁹⁴*See* Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973).

⁹⁵"Equus" and "Bent," dramatic productions involving nudity, have been presented by theater companies in Indiana since the enactment of the Public Indecency Statute. No actor or actress in these productions has been charged with violating the statute. One county prosecutor determined that the performance did not violate the law because there was nothing obscene about the performance. *See* Brief for Appellant at 12, *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

⁹⁶*Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

⁹⁷*Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587.

Dance predates most modes of expressing emotion and dramatic feeling. In its earliest forms, dance was part of the tribal ritual or religious practice.⁹⁸ Biblical passages, especially in the book of Psalms, are replete with references to dance as a form of expressing happiness, contentment, and praise.⁹⁹ Today, the local ballet troupe or modern dance company is not without its loyal subscribers. Local dance halls or discotheques thrive on the public interest in dance both as an activity and as a spectacle. To classify dance as a means of expression less important or less communicative than spoken, printed, filmed, or recorded ideas is folly. The first amendment "market place of ideas" cannot be limited to those items which are solely intellectual in content.¹⁰⁰ Although dance has historically been a mode of expression which is more emotive than cognitive, this distinction does not lessen its protection under the Constitution.¹⁰¹

Presumably, the Indiana Supreme Court accepts dance as a protective form of expression but objects to the injection of an act which is unrelated or disconnected from traditional expression protected by the first amendment.¹⁰² The dance, consisting of rhythmical body movements, may be protected expression but it may not be done in the nude.¹⁰³ Such a proscription, however, misperceives the nature of the act. As with a dramatic work or musical score which attempts to convey an emotive message, the costume, the actor, the set, the consonance and dissonance cannot be separated from the act. All combine to produce emotive expression. No clear distinction can be drawn between that act which is merely conduct in the performance and that which is protected expression.¹⁰⁴

⁹⁸See *In re Gianninni*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655.

⁹⁹See, e.g., *Psalms* 149:3 ("Let them praise his name with dancing, making melody to him with timbrel and lyre!"); *Psalms* 150:4 ("Praise him with timbrel and dance. . .").

¹⁰⁰See Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973).

¹⁰¹See *Cohen v. California*, 403 U.S. 15, 26 (1971).

¹⁰²*Baysinger*, 272 Ind. at 244, 397 N.E.2d at 585. "We read *LaRue* to caution against attempting to censor dramatic performances in theaters or movies, which may be protected expression." *Id.*

¹⁰³272 Ind. at 244, 397 N.E.2d at 585 (quoting *California v. LaRue*, 409 U.S. 109, 117 (1972)).

But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action."

Id.

¹⁰⁴See *supra* note 100.

Nude dancing, however, has been criticized as containing no expressive element protected by the first amendment.¹⁰⁵ It has been labeled as mere conduct amounting to nothing more than a "sales gimmick."¹⁰⁶ The fact that nude dancing may be carried on for profit is inconsequential for constitutional protection.¹⁰⁷ The more erroneous and potentially dangerous assumption belied by this accusation, however, is the belief that courts can make significant distinctions in the appropriate use of nudity in the ballet and the appropriate use of public nudity in performing a rhythmic dance at the local exhibition hall. The United States Supreme Court recognized, in *Cohen v. California*,¹⁰⁸ that "it is largely because governmental officials cannot make principled distinctions in this area [of offensive conduct] that the Constitution leaves matters of taste and style so largely to the individual."¹⁰⁹ Courts are unlikely arbiters in distinguishing between nudity which insults and degrades and nudity which exalts the beauty of the human form. Although "the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by the critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye."¹¹⁰ The artistic preferences and prurient interests of the vulgar are entitled to no less protection than those of the exquisite esthete.

Nude dancing must be afforded a presumption of constitutional protection. With a showing that the nude display is merely a pretense for the exhibition of public nudity, the presumption could be overcome.¹¹¹ Furthermore, public displays of nudity even in the form of expressive dance are not immune from regulation.¹¹² As the United States Supreme Court has consistently held in its decisions, the individual's right to expression may be outweighed by the state's interest in regulating the sale of liquor under the twenty-first amendment.¹¹³ Thus, the state may legitimately proscribe the forum in which the expressive dance may occur.

¹⁰⁵*Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979); *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984). See also *supra* note 31.

¹⁰⁶See *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, 32 Cal. 3d 553, 571, 652 P.2d 51, 62, 186 Cal. Rptr. 494, 505 (1982) (Richardson, J., dissenting).

¹⁰⁷See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (it is immaterial whether an activity which enjoys first amendment protection is carried on for profit).

¹⁰⁸403 U.S. 15 (1971).

¹⁰⁹*Id.* at 25.

¹¹⁰*Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974).

¹¹¹See, e.g., *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971).

¹¹²See *supra* note 65.

¹¹³See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

Additionally, if the legislature perceives a legitimate interest in regulating nude dancing, then upon articulating this interest and tailoring the regulation narrowly, the legislature may enact regulations designed to serve that end. Interests such as community planning concerns, parking problems, increasing need for police protection,¹¹⁴ the promotion of public morals, protection of the health of the community, and the exploitation of human nudity in a degrading manner, however, are insufficient interests to satisfy this purpose.¹¹⁵ At least with the legislature's interest articulated, Indiana's Public Indecency Statute can be pared of its overbreadth and tailored to serve those particular goals.

IV. CONCLUSION

Presently, Indiana's Public Indecency Statute encroaches upon legitimate expression involving public nudity. The Indiana courts are reluctant to carve out an exception under the statute or declare the statute overbroad. The majority of the justices of the Indiana Supreme Court appear committed to the idea that public nudity occurring in relation to dance is not entitled to even a presumption of constitutional protection.¹¹⁶ Until the Indiana General Assembly defines the interests sought to be protected and narrows the current statute, or until the composition of the Indiana Supreme Court undergoes a change sufficient to alter the balance of opinions, professional ecdysiasts are prohibited from performing their dances in any public hall, theater, or commercial establishment in Indiana.

Alternatively, professional dancers may seek protection for their communication in a federal forum where the law may be more sensitively applied and where first amendment rights may be zealously guarded.¹¹⁷ A plaintiff seeking first amendment protection in Indiana may be denied his or her request in the state courts, but may simply walk across the street to the federal court and obtain protection. That first amendment

¹¹⁴These interests were expressly rejected by the United States Supreme Court in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), as insubstantial to warrant regulation of nudity.

¹¹⁵In *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, the California Supreme Court reviewed these interests as first presented in *Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973) and concluded the interests were too insubstantial to warrant regulation. 32 Cal. 3d 566-69, 652 P.2d 59-61, 186 Cal. Rptr. 501-03.

¹¹⁶See *supra* text accompanying note 84. See also *supra* note 90.

¹¹⁷On July 29, 1985, the Honorable Judge Allen Sharp, Chief Judge for the United States District Court, Northern District of Indiana, enjoined the City of South Bend, South Bend Police Department, the prosecutor of South Bend, and the Attorney General of the State of Indiana from enforcing Indiana's Public Indecency Statute against any true nude or semi-nude entertainment performed by professional dancers at a northern Indiana adult bookstore. *Glen Theatre, Inc. v. Civil City of South Bend*, No. 585-353, slip. op. at 12 (N.D. Ind. July 29, 1985).

protection for nude dancing depends upon the forum in which the complaint is filed, however, is a concept heretical to all notions of justice. Justice DeBruler's call for a "remand to the legislature . . . to draw the line between legitimate public nudity and criminal public nudity"¹¹⁸ must not go unheeded.

¹¹⁸See *supra* text accompanying note 12.

Environmental Law — Legislative Developments

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I. PUBLIC LAW 143-1985

The most important development in Indiana environmental legislation in 1984-85 was the passage of Public Law 143-1985, the new Environmental Management Act (the "Act").¹ The Act reorganizes Indiana's environmental regulation programs² and creates the Department of Environmental Management as the state agency specifically charged with protection of the environment.³

Impetus for the new Act came from the Indiana Environmental Policy Commission (the "Commission"). The Governor created this Commission in 1983 and charged it with the duty to study Indiana's environmental policies and programs and to recommend comprehensive, long-term policies "to assure the protection of public health as well as a healthy competitive business climate."⁴ The seven-member Commission included two representatives of environmental interests, two industrial representatives, and three members at large.⁵ The Commission heard testimony over an eight-month period on four topics: organization and

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¹Pub. L. No. 143-1985 (primarily codified in scattered sections of IND. CODE Tit. 13 (Supp. 1985)).

²Indiana's environmental programs regulate air, water, and land pollution. *See generally* IND. CODE §§ 13-1-1-1 to -11 (1982 & Supp. 1985) concerning air pollution control, IND. CODE §§ 13-1-3-1 to -17 (1982 & Supp. 1985) concerning water pollution control, and IND. CODE §§ 13-7-4-1(c), (d), and (g), and 13-7-10-1 (Supp. 1985) concerning land pollution control. The land pollution control program governs the management of solid (non-hazardous) and hazardous wastes. *See* 330 IND. ADMIN. CODE 4-1-1 to 4-9-5 (1985) and 320 IND. ADMIN. CODE 4.1-1-1 to 4.1-56-3 (promulgated at 8 Ind. Reg. 1721 (1985)), which govern solid and hazardous waste management respectively.

³*See* Pub. L. No. 143-1985, § 96 (codified at IND. CODE § 13-7-2-11 (Supp. 1985)). *See also* Pub. L. No. 143-1985, §§ 101-110 (codified at IND. CODE §§ 13-73-3-3 to -13 (Supp. 1985)), which sets forth the Department's authority and duties.

⁴Exec. Order No. 16-83, 7 Ind. Reg. 248-49 (1983).

⁵*Id.* *See also* INDIANA ENVIRONMENTAL POLICY COMMISSION, FINAL REPORT TO GOVERNOR ROBERT D. ORR AND THE INDIANA GENERAL ASSEMBLY 2-3 (Dec. 1, 1984) [hereinafter cited as FINAL REPORT].

management of state environmental functions, funding, state environmental policy, and public awareness and participation.⁶

A. *Background for the Changes*

In 1943, the Stream Pollution Control Board was delegated authority to reduce pollution of Indiana's surface waters.⁷ In 1961, the Air Pollution Control Board was created and was assigned the task of regulating air pollution.⁸ The General Assembly created the Environmental Management Board in 1972 to oversee the Stream and Air Boards and to administer overall environmental policies in the state.⁹ The Environmental Management Board later acquired jurisdiction over solid waste management.¹⁰

Responsibility for executing the tasks assigned the three boards was placed on the State Board of Health. At present, the Indiana State Board of Health is responsible for providing staff services to the Air Board, the Stream Board, and the Environmental Management Board.¹¹

The Commission determined, however, that the growing burden on the existing environmental boards resulting from the increasing technical complexity of environmental issues and the increased national and local concern regarding environmental issues required that a new system of environmental regulation be developed for the mid-eighties and beyond.¹² It found that establishing a separate agency, with its own budget,¹³ to manage the state's environmental programs would best redress the deficiencies in the current system.¹⁴

⁶*Id.* at 3-4.

⁷1943 Ind. Acts 624.

⁸1961 Ind. Acts 380.

⁹1972 Ind. Acts 555.

¹⁰In 1972 the legislature transferred responsibility for solid waste regulation from the State Board of Health to the Environmental Management Board. See 1972 Ind. Acts 555, 563-64.

¹¹FINAL REPORT at 5.

¹²See *id.* at 10.

¹³*Id.* at 10-11. Funding to carry out the provisions of the new Environmental Management Act, with one exception, is provided through appropriations to the Department of Environmental Management. Pub. L. No. 143-1985, § 178 (codified at IND. CODE § 13-7-18-1(a) (Supp. 1985)). Funding for the purposes of IND. CODE §§ 13-7-14-1 to -5 (Supp. 1985), concerning public water supplies, is provided through appropriations to the State Board of Health. Pub. L. No. 143-1985, § 178 (codified at IND. CODE § 13-7-18-1(b) (Supp. 1985)).

¹⁴FINAL REPORT at 10. The Commission concluded that because present environmental staff are located within the structure of the Indiana State Board of Health, the environmental programs must compete with the public health functions of seven other bureaus to secure adequate staff classifications, funding, and resources. *Id.* at 13. It further found that the general assembly does not have adequate opportunity to address the environmental programs as a distinct entity when evaluating budget requests. *Id.*

B. Changes Effected by the New Act

The new Act removes the existing environmental programs from the Indiana State Board of Health and places them under the supervision of the new Department of Environmental Management (the "Department"), which is intended to have exclusive responsibility for environmental matters.¹⁵ The new Act also makes several changes in the environmental boards. The Environmental Management Board will no longer serve as an umbrella board with responsibility for reviewing and approving the actions of the Air and Stream Pollution Control Boards. The Environmental Management Board will instead become the Solid Waste Management Board and continue, as its sole responsibility, implementation of the solid and hazardous waste management programs.¹⁶

The Air and Water¹⁷ Pollution Control Boards will maintain authority for their traditional regulatory programs.¹⁸ Under the new Act, however, the functions of all three boards are limited to establishing policy, rulemaking, and considering appeals from certain actions taken by the Department's representatives.¹⁹ The Act makes clear that rulemaking is to be carried out by the boards pursuant to the provisions of Indiana's administrative rulemaking statute, Indiana Code chapter 4-22-2.²⁰

The new Act makes some changes in board membership, including the addition of a representative of environmental interests to each of the boards.²¹ The Secretary of the Indiana State Board of Health and

¹⁵See Pub. L. No. 143-1985, §§ 101-10 (codified at IND. CODE §§ 13-7-3-3 to -13 (Supp. 1985)).

¹⁶Pub. L. No. 143-1985, § 49 (codified at IND. CODE §§ 13-1-12-1 to -8 (Supp. 1985)).

¹⁷The Stream Pollution Control Board was renamed the Water Pollution Control Board by the new Act. See Pub. L. No. 143-1985, § 12 (codified at IND. CODE § 13-1-3-1 (Supp. 1985)).

¹⁸See, e.g., Pub. L. No. 143-1985, § 1 (codified at IND. CODE § 13-1-1-1 (Supp. 1985)) (the Air Pollution Control Board shall safeguard the air resource through prevention, abatement, and control of air pollution); Pub. L. No. 143-1985, § 16 (codified at IND. CODE § 13-1-3-4 (Supp. 1985)) (the Water Pollution Control Board shall adopt rules for the control and prevention of water pollution).

¹⁹See, e.g., Pub. L. No. 143-1985, §§ 1-11 (codified at IND. CODE §§ 13-1-1-1 to -11 (Supp. 1985)) (setting forth the air pollution regulation duties and powers of the Air Pollution Control Board, Department of Environmental Management, and Commissioner of the Department); Pub. L. No. 143-1985, §§ 15-40 (codified at IND. CODE §§ 13-1-3-3 to -17, 13-1-4-1 to -3, 13-1-5-1 to -2, 13-1-5.5-3 to -6, and 13-1-5.7-1 to -6 (Supp. 1985)) (setting forth the water pollution regulation duties and powers of the Water Pollution Control Board, Department, and Commissioner); Pub. L. No. 143-1985, §§ 49, 129-34 (codified at IND. CODE §§ 13-1-12-1 to -8, 13-7-8.5-1 to -9 (Supp. 1985)) (setting forth the land pollution regulation duties and powers of the Solid Waste Management Board, Department, and Commissioner).

²⁰Pub. L. No. 143-1985, § 126 (codified at IND. CODE § 13-7-7-5 (Supp. 1985)).

²¹See Pub. L. No. 143-1985, § 3 (codified at IND. CODE § 13-1-1-3 (Supp. 1985)) (establishing the membership of the Air Pollution Control Board); Pub. L. No. 143-1985, § 14

the Director of the Department of Natural Resources will both maintain their roles as *ex officio* voting members of each board to assure coordination between public health and natural resource objectives.²²

The Act also creates the new office of Commissioner to assume primary responsibility for carrying out environmental objectives, with the boards being the primary entities for establishing state policy.²³ Now, each board has its own technical secretary.²⁴ According to the new Act, the Commissioner or his designee will serve as the technical secretary of each board to assure coordination among the different regulatory areas of air, water, and solid waste management.²⁵ The Commissioner and the Department have the duty and power to carry out the adjudicatory provisions of the Act, including making investigations, issuing enforcement orders, and holding hearings with respect to suspected violations.²⁶

The Department begins to function July 1, 1986, but the law allows the Governor to initiate action prior to that date pursuant to executive order.²⁷ The law requires that the Governor appoint the Commissioner, which he has done.²⁸ The Commissioner will appoint the directors of the air pollution control, water pollution control, and solid waste management divisions, and the director of public affairs of the Department.²⁹ The Governor will also appoint six members of the Air Pollution Control Board, six members of the Water Pollution Control Board, and six members of the Solid Waste Management Board, who will all take office on July 1, 1986.³⁰

Among items of particular interest are permit issuance procedures, which are clarified in the new Act. Indiana Code section 13-7-10-1 has been

(codified at IND. CODE § 13-1-3-2 (Supp. 1985)) (establishing the membership of the Water Pollution Control Board); Pub. L. No. 143-1985, § 49 (codified at IND. CODE § 13-1-12-6 (Supp. 1985)) (establishing the membership of the Solid Waste Management Board).

²²See IND. CODE §§ 13-1-1-3, 13-1-3-2, and 13-1-12-6 (Supp. 1985).

²³Pub. L. No. 143-1985, § 97 (codified at IND. CODE § 13-7-2-12 (Supp. 1985)).

²⁴See IND. CODE § 13-1-1-3 (1982) regarding appointment of a technical secretary to the Air Pollution Control Board, IND. CODE § 13-1-3-3 (1982) regarding appointment of a technical secretary to the Stream Pollution Control Board, and IND. CODE § 13-7-2-2(b) (1982) regarding appointment of a technical secretary to the Environmental Management Board.

²⁵Pub. L. No. 143-1985, § 3 (codified at IND. CODE § 13-1-1-3(e) (Supp. 1985)); Pub. L. No. 143-1985, § 15 (codified at IND. CODE § 13-1-3-3(b) (Supp. 1985)); Pub. L. No. 143-1985, § 49 (codified at IND. CODE § 13-1-12-7(b) (Supp. 1985)).

²⁶See, e.g., Pub. L. No. 143-1985, §§ 4 and 8 (codified at IND. CODE §§ 13-1-1-4 and 13-1-1-8 (Supp. 1985)) (concerning air pollution control).

²⁷Pub. L. No. 143-1985, § 208 (a non-code section).

²⁸The governor appointed Nancy A. Maloley to that position on July 19, 1985. Indianapolis Star, July 20, 1985, at 35, col. 3.

²⁹See Pub. L. No. 143-1985, § 97 (codified at IND. CODE § 13-7-2-12 (Supp. 1985)) authorizing the Commissioner to make appointments to other positions in the Department.

³⁰Pub. L. No. 143-1985, § 210 (a non-code section).

amended to provide that each board establish requirements and procedures for the issuance of permits.³¹ While the rules the boards must follow in the issuance of permits must be adopted under Indiana's administrative rulemaking statute,³² the permit issuance procedures do not, with one exception,³³ require adherence to Indiana's Administrative Adjudication Act (the "AAA").³⁴ Rather, consistent with the Indiana Supreme Court's holding in *State ex rel. Calumet National Bank v. McCord*³⁵ and the Indiana Court of Appeals' holding in *Indiana Environmental Management Board v. Town of Bremen*,³⁶ Indiana Code section 13-7-10-2.5, a new provision, prescribes permit issuance procedure.³⁷

In response to applications for original or renewal permits, the Commissioner must, if required by statute, or may, if not so required, publish a notice requesting comments concerning the issuance or denial of the permit.³⁸ If requested by a member of the public, the Commissioner may hold a public hearing in the geographical area affected by the permit. After the comment period, or if a public hearing is held, after the public hearing, the Commissioner will issue the permit or deny the permit application.³⁹ Ordinarily, the Commissioner's action is effective immediately.⁴⁰

Notice of the Commissioner's action on the permit application must be served upon the permit applicant, each person who submitted written comments with respect to the permit, and each person who requested notice of the permit determination.⁴¹ Under some circumstances, the Commissioner may publish notice of the action on the permit in a newspaper of general circulation in the county affected by the proposed permit.⁴²

Within fifteen days after receiving the notice of the permit issuance or denial, the permit applicant or "any other person aggrieved by the

³¹Pub. L. No. 143-1985, § 147 (codified at IND. CODE § 13-7-10-1 (Supp. 1985)).

³²*Id.*

³³See *infra* text accompanying notes 50-51.

³⁴Pub. L. No. 143-1985, § 147 (codified at IND. CODE § 13-7-10-1 (Supp. 1985)).

The new Act also clarifies the procedure for obtaining variances from rules adopted by a board by declaring that all proceedings under IND. CODE § 13-7-7-6, the variance provision, "are governed by IC 4-22-1," the Indiana Administrative Adjudication Act. Pub. L. No. 143-1985, § 127 (codified at IND. CODE § 13-7-7-6 (Supp. 1985)).

³⁵243 Ind. 626, 189 N.E.2d 583 (1963).

³⁶458 N.E.2d 672 (Ind. Ct. App. 1984), *transfer denied*, May 3, 1984.

³⁷Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(a) (Supp. 1985)).

³⁸*Id.*

³⁹*Id.* (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

⁴⁰The Commissioner's action is effective immediately unless he or she states otherwise in writing. Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

⁴¹*Id.*

⁴²*Id.*

commissioner's action" may appeal the Commissioner's action to the appropriate board and request that the board hold an adjudicatory hearing concerning that action.⁴³ Thus, all pre-issuance procedures are carried out under the law relating to the particular board and not under the AAA. Following the issuance or denial of the permit, the appeal of that issuance or denial is carried out under the AAA.⁴⁴

Any written request for an adjudicatory hearing must, among other things, state with particularity the reason for the request and the issues proposed for consideration at the requested hearing. The written request must further identify the permit terms and conditions which, in the judgment of the person making the request, would be appropriate to satisfy the requirements of the law governing permits of the type granted or denied by the Commissioner.⁴⁵ In addition, "any person aggrieved by the revocation or modification of a permit [as opposed to the issuance or denial of a permit] may appeal the revocation or modification" under the AAA.⁴⁶ Pending the decision on the appeal, the permit remains in force.⁴⁷ However, the new Act empowers the commissioner to seek injunctive relief with regard to the activity authorized in the permit while the decision on the revocation or modification appeal is pending.⁴⁸

One exception to the general permitting provision of the new Act is the issuance of permits for public water supplies.⁴⁹ Indiana Code section 13-7-14-1 provides that in determining whether to issue a permit for a public water supply, the State Board of Health, not the Department, will proceed under the AAA, not under the rules of the Board.⁵⁰ Revocation and modification of permits for public water supplies are also handled by the State Board of Health.⁵¹

Other changes in the new Act include section 159, which amends Code section 13-7-13-1 to make it a Class C infraction for a person "to obstruct, delay, resist, prevent or interfere" with the Department and its personnel or "designated agent" in the performance of an inspection or investigation conducted pursuant to a Indiana Code section 13-7-5-3.⁵² Section 13-7-5-3 is a new provision which allows the Department's designated agent to enter upon private or public property to investigate "possible violations" of the Act or of any of the boards' rules.⁵³

⁴³*Id.* (codified at IND. CODE § 13-7-10-2.5(c) (Supp. 1985)).

⁴⁴*Id.*

⁴⁵*Id.* (codified at IND. CODE § 13-7-10-2.5(d) (Supp. 1985)).

⁴⁶Pub. L. No. 143-1985, § 150 (codified at IND. CODE § 13-7-10-5(b) (Supp. 1985)).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹Pub. L. No. 143-1985, § 162 (codified at IND. CODE § 13-7-14-1 (Supp. 1985)).

⁵⁰*Id.* (codified at IND. CODE § 13-7-14-1(b) (Supp. 1985)).

⁵¹*Id.* (codified at IND. CODE § 13-7-14-1(c) (Supp. 1985)).

⁵²Pub. L. No. 143-1985, § 159 (codified at IND. CODE § 13-7-13-1 (Supp. 1985)).

⁵³Pub. L. No. 143-1985, § 114 (codified at IND. CODE § 13-7-5-3 (Supp. 1985)). War-

Code section 2-5-4-6 is added by the new Act to create a permanent Indiana Environmental Policy Commission.⁵⁴ The twelve-member policy commission is charged with the duty to consider long-term environmental policy matters and to undertake an ongoing evaluation of the total environmental program of the state of Indiana.⁵⁵ The Commission's members will be divided among political parties and between representation of environmental and economic interests.⁵⁶

Because the new Act was considered an emergency provision, section 212 provides that two other sections,⁵⁷ which concern the designation of air quality standard attainment and non-attainment areas,⁵⁸ take effect upon the Act's passage.⁵⁹ All other sections of the new Act, with the exception of section 179, which creates the Indiana Environmental Policy Commission,⁶⁰ are effective on July 1, 1986.⁶¹ Section 208 provides for implementation of the provisions of the Act that transfer functions from the Environmental Management Board and the staff of the State Board of Health to the Department of Environmental Management, State Board of Health, and the Solid Waste Management Board.⁶² The transfer of

rantless searches, however, are generally unreasonable under the fourth amendment. *See, e.g.,* *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). This rule applies to commercial premises as well as homes, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-13 (1978), and to searches by agents of the state, *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁴Pub. L. No. 143-1985, § 179 (codified at IND. CODE § 2-5-4-6 (Supp. 1985) (effective July 1, 1987)).

⁵⁵*Id.* (codified at IND. CODE § 2-5-4-6(b) (Supp. 1985)).

⁵⁶*Id.* (codified at IND. CODE § 2-5-4-6(a) (Supp. 1985)).

⁵⁷Pub. L. No. 143-1985, § 5 (codified at IND. CODE § 13-1-1-5 (Supp. 1985)); Pub. L. No. 143-1985, § 211 (a non-code section).

⁵⁸The Air Pollution Control Board can classify certain geographic regions within the state as having attained or not attained ambient air quality standards for regulated pollutants. *See* IND. CODE § 13-1-1-5 (Supp. 1985).

⁵⁹Pub. L. No. 143-1985, § 212 (a non-code section).

In *Indiana Air Pollution Control Board v. City of Richmond*, 457 N.E.2d 204 (Ind. 1983), the Indiana Supreme Court held void the Air Pollution Control Board's designation of counties and sub-county areas as having attained or not attained ambient air quality standards. The court so held because the Board had improperly followed state rulemaking procedures rather than proceeding under the adjudicatory procedures of the AAA in arriving at the designations. *See id.* at 206-07. Pub. L. No. 143-1985, § 5, specifies that a rulemaking under the state's general rulemaking statute (IND. CODE §§ 4-22-2-3 and 4-22-2-13 to -44 (Supp. 1985)) is the procedure by which the Air Pollution Control Board should make such attainment/non-attainment designations, rather than by adjudication under the AAA as the Indiana Supreme Court held. Pub. L. No. 143-1985, § 211 (a non-code section), in turn validates the administrative rule invalidated by the court in *City of Richmond*, 325 IND. ADMIN. CODE 1.1-3-1 to -6 (1984). The new law states that the Air Pollution Control Board may enforce this regulation as if it had been adopted under IND. CODE § 13-1-1-5 as amended in 1985. Pub. L. No. 143-1985, § 211(a).

⁶⁰Pub. L. No. 143-1985, § 179 (codified at IND. CODE § 2-5-4-6 (Supp. 1985) (effective July 1, 1987)).

⁶¹Pub. L. No. 143-1985, § 212 (a non-code section).

⁶²Pub. L. No. 143-1985, § 208 (a non-code section).

functions effected under the new Act is delayed until October 1, 1986, or the date on which the Governor, by executive order, finds that the Department of Environmental Management and the Solid Waste Management Board are capable of assuming the functions transferred to them under the new Act, whichever date occurs first.⁶³

II. PUBLIC LAW 120-1985

Public Law 120-1985 repeals two Indiana Code sections that established air pollution control requirements and maximum noise limits for the exhaust systems of motor vehicles.⁶⁴ In place of these provisions, new Indiana Code section 9-8-6-36.6 establishes a general requirement that all motor vehicles be equipped with a muffler free from "visually discernible" leaks, alterations, or deterioration of muffler elements.⁶⁵ Motor vehicles, except antique motor vehicles registered under code section 9-7-6-2, must be equipped with a muffler or "other noise dissipating device" in good working order and in constant operation to prevent excessive noise.⁶⁶ Omitted from the new law are the specific maximum noise limits, measured in decibels as a function of vehicle size and traveling speed, set forth in repealed section 9-8-6-36.5.⁶⁷ In the same manner as prohibited by the repealed code section 9-8-6-36, the new law specifically outlaws muffler cutouts, bypass pipes, and similar devices.⁶⁸ The new law continues the prior law's requirement that engines and power mechanisms be equipped and adjusted to prevent excessive fumes or smoke.⁶⁹

III. PUBLIC LAW 144-1985

Public Law 144-1985 extensively revises and expands the emergency regulation of the underground water rights established by Indiana Code chapter 13-2-2.5.⁷⁰ While the original provisions of the law were applicable only to Jasper and Newton Counties,⁷¹ the new law expands the scope of chapter 2.5 to all counties in the state.⁷² The new law also repeals

⁶³*Id.*

⁶⁴Pub. L. No. 120-1985, § 2, repealed IND. CODE §§ 9-8-6-36 and 9-8-6-36.5 (1982).

⁶⁵Pub. L. No. 120-1985, § 1 (codified at IND. CODE § 9-8-6-36.6(b) (Supp. 1985)).

⁶⁶*Id.* (codified at IND. CODE § 9-8-6-36.6(c) (Supp. 1985)).

⁶⁷IND. CODE § 9-8-6-36.5 (1982). For example, the maximum noise limit for a 7,000 pound vehicle traveling over 35 miles per hour was 90 decibels on the A scale. *Id.*

⁶⁸Pub. L. No. 120-1985, § 1 (codified at IND. CODE § 9-8-6-36.6(d) (Supp. 1985)).

⁶⁹*Id.* (codified at IND. CODE § 9-8-6-36.6(e) (Supp. 1985)).

⁷⁰IND. CODE §§ 13-2-2.5-1 to -9 (1982), *amended by* Pub. L. No. 144-1985, §§ 1-7 (codified at IND. CODE §§ 13-2-2.5-2, -3, -6, and -9 to -12 (Supp. 1985)).

⁷¹*See* IND. CODE § 13-2-2.5-3 (1982).

⁷²*See* Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3 (Supp. 1985)).

the exception contained in Indiana Code section 13-2-2.5-7,⁷³ thereby making chapter 2.5 applicable to the state and its political subdivisions.⁷⁴

The definitions in Indiana Code section 13-2-2.5-2 are expanded, including the definition of "nonsignificant" and "significant" groundwater withdrawal facilities.⁷⁵ A "nonsignificant groundwater withdrawal facility" has a withdrawal capacity of less than 100,000 gallons of water in one day.⁷⁶ The Director of the Department of Natural Resources is given the power to investigate the impairment of nonsignificant groundwater withdrawal facilities by the activities of significant groundwater withdrawal facilities.⁷⁷ Under the new law, the Director of the Department of Natural Resources may, by temporary order, declare a groundwater emergency and restrict the quantity of water that may be extracted from a significant groundwater withdrawal facility.⁷⁸ The temporary order will be in effect until a hearing conducted pursuant to Indiana Code section 4-22-1-5⁷⁹ can be held.⁸⁰ The sanction for violation of chapter 2.5 is increased from a Class B to a Class A infraction, and the new law provides that the Commission may, without proof of irreparable injury, maintain an action to enjoin violations.⁸¹

The new law also requires that the owner of a significant groundwater withdrawal facility provide timely and reasonable compensation to the owners of nonsignificant groundwater withdrawal facilities in the event of a failure or substantial impairment of those facilities caused by groundwater withdrawals from the significant groundwater withdrawal facility, provided that the nonsignificant groundwater withdrawal facility, if constructed after December 31, 1985, conforms to the recommended guidelines of the Department of Natural Resources issued pursuant to Indiana Code section 13-2-2.5.⁸² Timely and reasonable compensation has two components: first, the immediate temporary provision of an adequate supply of potable water at the prior point of use, and second, one of three alternative measures intended either to restore the capacity of the nonsignificant withdrawal facility or to provide a permanent alternative

⁷³This exception provided that IND. CODE §§ 13-2-2.5-1 to -9 (1982) did not apply to the state or its political subdivisions. IND. CODE § 13-2-2.5-7 (1982).

⁷⁴See Pub. L. No. 144-1985, § 8 (a non-code section), *repealing* IND. CODE § 13-2-2.5-7 (1982).

⁷⁵Pub. L. No. 144-1985, § 1 (codified at IND. CODE § 13-2-2.5-2 (Supp. 1985)).

⁷⁶*Id.*

⁷⁷Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3(a) (Supp. 1985)).

⁷⁸*Id.*

⁷⁹*Id.* The statute under which the hearing must be held is one provision in the AAA. IND. CODE § 4-22-1-5 (Supp. 1985).

⁸⁰Pub. L. No. 144-1985, § 2 (codified at IND. CODE § 13-2-2.5-3(a) (Supp. 1985)).

⁸¹Pub. L. No. 144-1985, § 4 (codified at IND. CODE § 13-2-2.5-9 (Supp. 1985)).

⁸²Pub. L. No. 144-1985, § 5 (codified at IND. CODE § 13-2-2.5-10(a) (Supp. 1985)).

potable supply of an equal quantity at the point of use.⁸³ If an owner of an affected nonsignificant groundwater withdrawal facility refuses to accept the compensation prescribed in the new law, the Department of Natural Resources may terminate an order imposing any restrictions on the significant groundwater withdrawal facility.⁸⁴

The new law also provides that after December 31, 1985, all owners of new nonsignificant groundwater withdrawal facilities who wish to be protected by the new law must construct their facilities in conformity with the Department of Natural Resources' guidelines.⁸⁵ The law also imposes a duty on licensed water-well drilling contractors and plumbing contractors to advise the owner of a new nonsignificant groundwater withdrawal facility of the provisions of chapter 2.5.⁸⁶

IV. PUBLIC LAW 88-1985

Public Law 88-1985 provides incentives for Indiana's electric utilities to use Indiana coal to fuel power plants, primarily by assuring that the Public Service Commission will allow timely recovery of air pollution control compliance costs involved in the use of Indiana coal.⁸⁷ A new Indiana Code section 8-1-2-6.1 requires the Public Service Commission to recognize costs associated with an electric utility's research and development efforts concerning increased use of Indiana coal.⁸⁸ These research and development costs will be an allowable operating expense of the electric utility to be recovered in consumer rates for electric service.⁸⁹ Because the major impediments to use of Indiana coal from the Illinois Basin relate to sulfur and ash content, most of this research and development will focus on techniques and technologies for diminishing the adverse environmental consequences of burning such coal.

Perhaps the most noteworthy provision of the new law is Indiana Code section 8-1-2-6.6, which requires the Public Service Commission to allow Construction Works in Progress (CWIP) for "qualified pollution control property" constructed by an electric utility after October 1, 1985.⁹⁰ "Qualified pollution control property" is defined as an air pol-

⁸³*Id.* (codified at IND. CODE § 13-2-2.5-10(b) (Supp. 1985)).

⁸⁴*Id.* (codified at IND. CODE § 13-2-2.5-10(c) (Supp. 1985)).

⁸⁵Pub. L. No. 144-1985, § 7 (codified at IND. CODE § 13-2-2.5-12(a) (Supp. 1985)).

⁸⁶*Id.* (codified at IND. CODE § 13-2-2.5-12(b) (Supp. 1985)).

⁸⁷Pub. L. No. 88-1985 (codified at IND. CODE §§ 8-1-2-6.1, -6.6, -29, -42.5, and -61.5, and IND. CODE §§ 8-1-8.5-2 to -6 (Supp. 1985)).

⁸⁸Pub. L. No. 88-1985, § 1 (codified at IND. CODE § 8-1-2-6.1 (Supp. 1985)).

⁸⁹*Id.*

⁹⁰Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)). Normally, an electric utility may only earn a return on equipment that is in service. See IND. CODE § 8-1-2-6 (1982), which states that the Indiana Public Service Commission shall, for ratemaking purposes, value public utility property that is actually used and useful. Therefore,

lution control device on a coal burning electric generating facility that has been approved for use by the Public Service Commission, that meets applicable state or federal requirements, and that is designed to accommodate the burning of coal from the Illinois Basin.⁹¹ To qualify for CWIP treatment of pollution control property, the utility must establish that the subject generating facility will burn only Indiana coal as its primary fuel source once the air pollution control device is operational or "that the utility is justified because of economic considerations or governmental requirements in utilizing some non-Indiana coal."⁹² The Public Service Commission is given authority to adopt rules to implement the new section.⁹³

Following a recommendation of Governor Orr's study committee on utility issues, section thirteen of the new law adds a non-code provision requiring the Public Service Commission to study and develop proposals concerning the feasibility of implementing a statewide system of electrical power pooling with economic dispatch.⁹⁴ One of the specific areas to be studied by the Commission concerns the impact this pooling would have on sulfur dioxide emission levels.⁹⁵ The Commission's report was due on or before December 15, 1985.⁹⁶

V. PUBLIC LAW 78-1985

Public Law 78-1985 amends Indiana Code chapter 6-6-6.6 to provide substantial increases in the hazardous waste disposal tax and to provide new requirements for the allocation and use of these tax funds.⁹⁷ Although the maximum liability of any taxpayer for the disposal of taxable hazardous wastes by underground injection during any calendar year remains \$25,000, the tax rate levied for all methods of hazardous waste land disposal has changed from \$1.50 per ton of taxable hazardous

electric utilities usually cannot begin recovering the cost of facilities that are under construction because they are not yet in use and useful. These utilities must generally wait until the construction is complete before they can include the cost of constructing new equipment in their rate base. The new law, however, permits certain electric generating utilities to earn a return on qualified pollution control property that is "to be used and useful" because the Indiana Public Service Commission "shall for ratemaking purposes add to the value of that utility's property the value of the qualified pollution control property *under construction*. . . ." Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)) (emphasis added). Thus, these utilities may include in their rate base the cost of construction works in progress (CWIP).

⁹¹Pub. L. No. 88-1985, § 2 (codified at IND. CODE § 8-1-2-6.6(a) (Supp. 1985)).

⁹²*Id.* (codified at IND. CODE § 8-1-2-6.6(b) (Supp. 1985)).

⁹³*Id.* (codified at IND. CODE § 8-1-2-6.6(c) (Supp. 1985)).

⁹⁴Pub. L. No. 88-1985, § 13(a) (a non-code section).

⁹⁵*Id.* § 13(a)(4).

⁹⁶*Id.* § 13(b).

⁹⁷Pub. L. No. 78-1985, §§ 1-3 (codified at IND. CODE §§ 6-6-6.6-1 to -3 (Supp. 1985)).

waste to a gradually increasing tax ranging from \$4.50 per ton in September, 1985, to \$8.50 per ton in 1989.⁹⁸ Under the new law, seventy-five percent of the revenue produced will be deposited in the state Hazardous Substances Emergency Trust Fund and the remaining twenty-five percent will be paid to the county in which the disposal facility is located.⁹⁹ The new law requires that revenue paid over to the county be deposited in a separate county fund which can be drawn on to establish monitoring wells, to analyze samples from monitoring wells, to conduct tests and surveillance of hazardous waste containment, to provide for training of county and local health officials in procedures for dealing with hazardous substance emergencies, to provide equipment needed in dealing with such emergencies, to fund research on alternatives to land disposal, and to pay the costs of hazardous waste removal and remedial action at a site within the county.¹⁰⁰

VI. PUBLIC LAW 152-1985

Public Law 152-1985 requires that, before January 1, 1986, a "solid and hazardous waste materials exchange" be established to provide information regarding solid and hazardous wastes available in Indiana for recycling, treatment, or recovery.¹⁰¹ The exchange will benefit waste generators seeking recycling and treatment facilities for their waste and will benefit waste treatment and recovery firms seeking new business. The exchange may be established and operated by the Indiana Environmental Management Board or by a private organization.¹⁰²

Public Law 152-1985¹⁰³ also amends Indiana's existing statute¹⁰⁴ regarding the manifest form that must accompany shipments of hazardous wastes regulated under the federal Resource Conservation and Recovery Act.¹⁰⁵ The new state law provides that the manifest form used in Indiana must be the same form required by the United States Environmental Protection Agency.¹⁰⁶

In addition, generators of more than 1,000 kilograms of hazardous waste per month must send to the Land Pollution Control Division of the State Board of Health a copy of each manifest accompanying shipments of hazardous waste within five working days of the transportation

⁹⁸Pub. L. No. 78-1985, § 2 (codified at IND. CODE § 6-6-6.6-2(a) (Supp. 1985)).

⁹⁹Pub. L. No. 78-1985, § 3 (codified at IND. CODE § 6-6-6.6-3(a) (Supp. 1985)).

¹⁰⁰*Id.* (codified at IND. CODE § 6-6-6.6-3(b) (Supp. 1985)).

¹⁰¹Pub. L. No. 152-1985, § 1 (codified at IND. CODE § 13-7-3-2.5 (Supp. 1985)).

¹⁰²*Id.* (codified at IND. CODE § 13-7-3-2.5(c) (Supp. 1985)).

¹⁰³Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7 (Supp. 1985)).

¹⁰⁴IND. CODE § 13-7-8.5-7 (1982).

¹⁰⁵42 U.S.C. §§ 6901-91i (1982 & Supp. 1985).

¹⁰⁶Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7(a) (Supp. 1985)).

of any waste off the site of generation.¹⁰⁷ This manifest filing requirement also applies to out-of-state generators who send waste to a treatment, storage, or disposal facility in Indiana.¹⁰⁸ Similarly, the owner or operator of a treatment, storage, or disposal facility must send to the Land Pollution Control Division a copy of every manifest received "within five (5) days after receiving the manifest."¹⁰⁹ Although the new law gives generators five "working days" to send the manifest to the state, treatment, storage, or disposal facilities are only given "five days."¹¹⁰ These manifests will be "public records," as that term is defined in Indiana Code chapter 5-14-3,¹¹¹ and thus available to the public.¹¹² The Environmental Management Board was directed to adopt rules implementing this new law before January 1, 1986.¹¹³

VI. PUBLIC LAW 153-1985

The substantive change made by Public Law 153-1985¹¹⁴ relates to the permit requirement for a hazardous waste treatment or recovery facility owned by the person who generates the waste being treated or recovered at that facility. Prior law provided that a person did not need a permit for a treatment facility located at the same site where the waste was generated.¹¹⁵ The new law provides that no permit is required for a treatment *or recovery* facility if waste generated as a residual or secondary material from the manufacturing process is recycled, recovered, or reused by the person who generated the waste.¹¹⁶ Thus, the generator's treatment or recovery facility need not be located at the point of generation to avoid the permit requirement.

VIII. PUBLIC LAW 145-1985

Public Law 145-1985 adds to the Indiana Code a new section prohibiting any person from throwing, depositing, or leaving any "contaminant, garbage or solid waste" in or within fifteen feet of a lake or in or upon a floodway.¹¹⁷ The scope of this new prohibition is significantly reduced, however, because it does not apply to the "normal" use of

¹⁰⁷*Id.* (codified at IND. CODE § 13-7-8.5-7(b) (Supp. 1985)).

¹⁰⁸*Id.*

¹⁰⁹*Id.* (codified at IND. CODE § 13-7-8.5-7(c) (Supp. 1985)).

¹¹⁰*Id.*

¹¹¹IND. CODE §§ 5-14-3-1 to -10 (Supp. 1985).

¹¹²Pub. L. No. 152-1985, § 2 (codified at IND. CODE § 13-7-8.5-7(d) (Supp. 1985)).

¹¹³*Id.* (codified at IND. CODE § 13-7-8.5-7(e) (Supp. 1985)).

¹¹⁴Pub. L. No. 153-1985 (codified at IND. CODE § 13-7-8.5-5 (Supp. 1985)).

¹¹⁵IND. CODE § 13-7-8.5-5(e) (1982).

¹¹⁶Pub. L. No. 153-1985, § 1 (codified at IND. CODE § 13-7-8.5-5(e) (Supp. 1985)).

¹¹⁷Pub. L. No. 145-1985, § 1 (codified at IND. CODE § 13-2-22-13.5(a) (Supp. 1985)).

chemicals in agriculture, to a person holding a permit issued by the Natural Resources Commission, or to any activity controlled under the Indiana Water Pollution Control statute¹¹⁸ or the Indiana Environmental Management Act.¹¹⁹ Anyone who violates this new law commits a Class B infraction.¹²⁰

IX. PUBLIC LAW 353-1985

Sections one and two of Public Law 353-1985 concern the authority of local units of government over the collection and disposal of waste.¹²¹ Section two adds a new chapter, Indiana Code chapter 36-9-33, titled "Collection and Disposal of Waste."¹²² This chapter provides that a local unit of government

may by ordinance provide for and exclusively control the collection and disposal of solid waste under this Chapter within the unit. However, a unit may exercise its power only upon the completion of construction or acquisition of a facility for the processing or disposal of solid waste by incineration or similar methods.¹²³

The "solid waste" covered by this law is the waste defined in Indiana Code section 36-9-30-2,¹²⁴ except that the term does not include sludge, sewage, or gas, materials to be recovered or recycled, hazardous wastes regulated under Indiana Code chapter 13-7-8.5,¹²⁵ waste generated by a person if the waste disposed of is the waste generator's own sanitary landfill or recovered in the waste generator's own recovery facility, agricultural wastes, or wastes generated by a new manufacturing or commercial facility or the expansion of such facility.¹²⁶ The exemption for new or expanded manufacturing or commercial facilities and the exemption for hazardous waste regulated under code chapter 13-7-8.5 greatly reduce the scope of wastes subject to chapter 33.

¹¹⁸IND. CODE §§ 13-1-3-1 to -17 (Supp. 1985).

¹¹⁹Pub. L. No. 145-1985, § 1 (codified at IND. CODE § 13-2-22-13.5(b) (Supp. 1985)). The Environmental Management Act is contained in IND. CODE §§ 13-7-1-1 to 13-7-19-3 (1982 & Supp. 1985).

¹²⁰Pub. L. No. 145-1985, § 2 (codified at IND. CODE § 13-2-22-20 (Supp. 1985)).

¹²¹Pub. L. No. 353-1985, §§ 1-2 (codified at IND. CODE §§ 36-9-30-5.5, 36-9-33-1 to -6 (Supp. 1985)).

¹²²Pub. L. No. 353-1985, § 2 (codified at IND. CODE §§ 36-9-33-1 to -6 (Supp. 1985)).

¹²³*Id.* (codified at IND. CODE § 36-9-33-3 (Supp. 1985)).

¹²⁴A solid waste is "all putrescible and nonputrescible solid and semisolid wastes, except human excreta, but including garbage, rubbish, ashes, street cleanings, dead animals, offal, and solid commercial, industrial, and institutional wastes." IND. CODE § 36-9-30-2 (1982).

¹²⁵IND. CODE §§ 13-7-8.5-1 to -9 (1982 & Supp. 1985).

¹²⁶Pub. L. No. 353-1985, § 2 (codified at IND. CODE § 36-9-33-2 (Supp. 1985)).

Local units of government thus have authority to provide for, and exclusively control, the collection and disposal of solid waste at a facility constructed or acquired by the unit which employs "incineration or similar methods" — whatever the latter phrase means.¹²⁷ Section four of Public Law 353-1985 sets forth geographic limitations basically providing that one local government unit may not exercise the power granted under chapter 33 inside the boundaries of another unit.¹²⁸ Units are also empowered to contract for twenty years or less for the incineration of solid waste.¹²⁹

Public Law 353-1985 also establishes the Solid Waste Disposal Study Commission, whose purpose is to study the need for solid waste disposal systems in Indiana.¹³⁰ The Commission's study is to include an examination of the feasibility of resource recovery facilities.¹³¹ The Commission is to make recommendations to the General Assembly and the Governor, and these recommendations will be public records.¹³²

¹²⁷Pub. L. No. 353-1985, § 2 (codified at IND. CODE § 36-9-33-3 (Supp. 1985)).

¹²⁸*Id.* (codified at IND. CODE § 36-9-33-4 (Supp. 1985)).

¹²⁹Pub. L. No. 353-1985, § 1 (codified at IND. CODE § 36-9-30-5.5(b) (Supp. 1985)).

The precise impact of Pub. L. No. 353-1985 is not clear. Existing statutes provide that local units of government have authority to establish and operate their own facilities to collect and dispose of solid wastes and those facilities may employ a number of methods, including landfilling and incineration. *See* IND. CODE §§ 36-9-30-3 and -4 (1982 & Supp. 1985). Moreover, units also have authority to contract with persons for the collection or disposal of solid wastes. IND. CODE § 36-9-30-5 (Supp. 1985). Because Pub. L. No. 353-1985 requires that the incineration facility be constructed or acquired by the unit, it appears that this new law and pre-existing statutes substantially overlap.

¹³⁰Pub. L. No. 353-1985, § 3 (a non-code section).

¹³¹*Id.* § 3(d)(3).

¹³²*Id.* § 3(e). The Commission's existence expires on December 31, 1986. *Id.* § 3(i).

Intoxication Roadblocks

R. GEORGE WRIGHT*

In *State v. McLaughlin*,¹ the Indiana Court of Appeals was confronted with a fourth amendment issue arising from the defendant's motion to suppress evidence connected with his arrest at a roadblock for driving while intoxicated. The defendant driver had been arrested after failing a breathalyzer test administered at a police roadblock established "primarily for the purpose of detecting and apprehending drunk drivers."² In other words, the defendant had not been stopped primarily because he had aroused suspicion; the roadblock indiscriminately led to the gathering of the evidence.

The court of appeals employed the balancing test used by the United States Supreme Court in *Brown v. Texas*.³ Under this balancing test, the reasonableness of a seizure upon suspicion not focused on a particular individual — as opposed to a situation where an individual is stopped because he or she has aroused suspicion — requires weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."⁴

For guidance in further explicating the balancing test in *Brown*, the court turned to a decision of the Kansas Supreme Court.⁵ The Kansas court had, through its examination of a number of Supreme Court cases in various contexts, arrived at a list of thirteen explicitly non-exhaustive factors to be weighed somehow in the balance.⁶ The factors listed in *State v. Deskins* include:

- (1) The degree of discretion, if any, left to the officer in the field;
- (2) the location designated for the roadblock;
- (3) the time

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¹471 N.E.2d 1125 (Ind. Ct. App. 1984), *transfer denied*, May 3, 1985. *McLaughlin* has been quoted extensively in a recent New Jersey decision, *State v. Kirk*, 493 A.2d 1271, 1280-82 (N.J. Super. 1985).

²*Id.* at 1129. The seizure occurred prior to any individualized suspicion falling upon the defendant. *Id.* at 1128-29.

³443 U.S. 47, 50-51 (1979). *Brown* did not involve a drunk driving roadblock stop, and no other United States Supreme Court case has addressed the major issue raised in *McLaughlin*.

⁴*Id.* This test shares its obviously utilitarian foundations with the procedural due process test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

⁵*State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983).

⁶*Id.* at 542, 673 P.2d at 1185.

and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.⁷

While it is clear that, in Indiana, the reasonableness of the search does not require that every factor be found favorable to the state,⁸ the relative weight to be accorded each individual factor was left largely unspecified. The court of appeals did indicate in dicta that extreme or "unbridled discretion" of field officers, as opposed to supervisory officers, would by itself dictate a finding of the unreasonableness of the search.⁹ Field discretion, however, is probably not unique in its potential decisiveness. For example, unreasonably and unnecessarily lengthy detentions of motorists subject to no individualized suspicion would similarly dictate a finding of unreasonableness.¹⁰

If certain of the thirteen specified factors have the potential to be individually decisive of the case adversely to the state, it is arguable that others do not. The mere availability of less intrusive alternative procedures may be one example. The Supreme Court has recently observed in a somewhat different context that

[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.¹¹

⁷*Id.*, quoted in *State v. McLaughlin*, 471 N.E.2d 1125, 1135-36 (Ind. Ct. App. 1984), *transfer denied*, May 3, 1985.

⁸See 471 N.E.2d at 1136.

⁹*Id.* (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)).

¹⁰See *United States v. Sharpe*, 105 S. Ct. 1568, 1575 (1985).

¹¹*Id.* at 1576 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)) (citations omitted).

Without further elaboration of the weighing process, the court in *McLaughlin* went on to consider the thirteen factors in the context of the three-part balancing test in *Brown*.¹² The court in effect undertook an elaborate balancing-within-a-balancing. The court concluded that

Despite the gravity of the public concern for identifying and apprehending drunk drivers and the moderately low level of interference with individual liberty occasioned by the roadblock procedure, the state failed to present any evidence that the roadblock procedure advanced the public interest to a greater degree than would have been achieved by traditional methods of drunk-driving law enforcement, which are to be preferred because they are based upon a requirement of individualized suspicion.¹³

McLaughlin was thus in a way an easy case. The state raised only a detection-and-apprehension interest, and defaulted on its burden of showing the superiority of the roadblock procedures in this regard. The case therefore provides little guidance for future cases in which some quantum of evidence is presented, or in which long or short-term deterrence of drunk driving is the public interest alleged, or where a more easily demonstrable, but perhaps less crucial, public interest is raised, such as the expression of public concern over drunk driving, or the calling of community attention to the drunk driving problem.

The court in *McLaughlin* began its three-part analysis by finding the public concern served, or purportedly served, by the seizure to be "very grave indeed."¹⁴ The court took judicial notice of the extent of

¹²See 471 N.E.2d at 1135-36.

¹³*Id.* at 1141. This formulation of the court's holding is reassuring in that it explicitly recognizes that the proper inquiry is not into "the degree of effectiveness of the procedure," see *infra* text accompanying note 57, but into the *relative* effectiveness of the particular roadblock technique, as contrasted with the efficacy of the available alternatives. The formulation is less satisfactory insofar as it may suggest that detection and apprehension of drunk drivers, as opposed to deterrence of drunk driving, must be the primary state interest weighed in the balance; it must be remembered, however, that the state in *McLaughlin* did not allege or attempt to show a deterrence effect. *Id.* at 1129. It should also be noted that both *Brown* and *McLaughlin* appear to equate "public concern" with "the public interest." See *Brown*, 443 U.S. at 50-51; *McLaughlin*, 471 N.E.2d at 1135, 1141. Wherever the court is to look to determine the public interest, it is at least arguable that it may look to other sources to attune itself to public concerns. Nor is it clear that every public concern is fully consistent with the public interest, in the sense of being either well-advised or constitutionally legitimate.

¹⁴471 N.E.2d at 1137.

the drunk driving problem,¹⁵ and cited Indiana legislative responses along with judicial recognition of the magnitude of the problem.¹⁶

The court entered into its detailed discussion of the thirteen factors in examining the second element of the *Brown* balancing test — the degree to which the particular roadblock seizure advanced the public concerns involved.¹⁷ The court's crucial conclusion in this regard was that "[t]he

¹⁵While one court has, in *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (en banc), declined to take comparable judicial notice, the *McLaughlin* court's willingness to do so seems sound. See *id.* at 8 n.2, 663 P.2d at 999 n.2 (Feldman, J., specially concurring); *State v. Superior Court*, 143 Ariz. 45, 48, 691 P.2d 1073, 1076 (1984) (en banc) (minimizing the import of *Ekstrom* in this and other respects).

¹⁶471 N.E.2d at 1136 (citing *South Dakota v. Neville*, 459 U.S. 553 (1983), along with *Ruge v. Kovach*, 467 N.E.2d 673, 681 (Ind. 1984), in addition to recent Indiana statutory changes).

¹⁷471 N.E.2d at 1137. The second and third *Brown* criteria, which subsume most of the thirteen factors discussed originally in *Deskins* and adopted in *McLaughlin*, are treated variously in the increasing number of state cases involving intoxication roadblocks. For a discussion of a number of these cases, which continue to reach divergent results on varying facts and states of the record, see Note, *The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana*, 17 IND. L. REV. 1065 (1984). See also Annot., 37 A.L.R.4TH 10 (1985) (collecting routine roadblock cases without limitation to drunk driving stops, but already dated until supplemented). A sampling of additional recent law review articles includes: Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457 (1983); Comment, *The Prouse Dicta: From Random Stops to Sobriety Checkpoints?*, 20 IDAHO L. REV. 127 (1984); Comment, *Filling in the Blanks after Prouse: A New Standard for the Drinking-Driving Roadblock*, 20 LAND & WATER L. REV. 241 (1985); Comment, *Sobriety Checkpoint Roadblocks: Are They Constitutional in Light of Delaware v. Prouse?*, 28 ST. LOUIS U.L.J. 813 (1984); Comment, *The Fourth Amendment Roadblock Against Detecting Drunk Drivers*, 18 SUFFOLK U.L. REV. 475 (1984). Probably the most thoughtful of the articles not dealing specifically with Indiana law is Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123 (1984).

A number of the cases in this area are too recent to have been included in the *McLaughlin* opinion. Among these cases are *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) (en banc) (upholding DWI roadblock on fourth amendment challenge, thereby minimizing the import of *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 663 P.2d 992 (1983) (en banc), in which excessive on-site police discretion and a lack of evidence of the roadblock's superiority in apprehending drunk drivers led to a finding of unconstitutionality); *Jones v. State*, 459 So. 2d 1068 (Fla. Ct. App. 1984) (DWI roadblock unconstitutional due largely to inadequate factual record and, in particular, lack of evidence of comparative effectiveness in apprehending drunk drivers); *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984) (driver's license checkpoint case; defendant's motion to suppress sobriety evidence denied on appeal in light of minimal field discretion, minimal delay, clear identification by signs as a police checkpoint); *State v. Cloukey*, 486 A.2d 143 (Me. 1985) (driving on revoked license case; roadblock for traffic safety check; roadblock constitutional despite only modest supervisory involvement in advance planning stages); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984) (checkpoint established both to detect and deter drunk driving; upheld on constitutional grounds based on *Deskins* factors despite extremely dubious and equivocal statistical and anecdotal evidence

state . . . presented absolutely no evidence regarding the availability of less intrusive methods of law enforcement for combatting the drunk driving problem.”¹⁸ Similarly, the state, at the hearing on the defendant’s motion to suppress, offered no evidence “of the inadequacy of the traditional method of enforcing DWI laws, nor of the superiority of the roadblock method of identifying and apprehending drunk drivers.”¹⁹

Two questions are raised by the court’s analysis on this point. First, if it is legitimate to take judicial notice of the severity of the drunk driving problem, is it also legitimate for the court simply to infer the inadequacy of traditional methods from the magnitude and persistence of the problem?²⁰ Probably so, but this is of limited help to the state’s case, since the superiority of the roadblock method in achieving any of various possible purposes is clearly inapt for resolution by judicial notice.²¹

for the superior detection and deterrence effect of the checkpoint program); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) (DWI roadblock upheld despite rapid shifts in location; state required to show only a reasonable basis for an asserted deterrence or detection effect and not required to separate out the incremental deterrent effect of the roadblock from that of other components of the state’s broader effort against drunk driving); *People v. Torres*, 125 Misc. 2d 78, 478 N.Y.S.2d 771 (Crim. Ct. 1984) (DWI roadblock permissible where established in non-arbitrary manner and discernible need established; decided without benefit of court of appeals opinion in *Scott*); *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984) (roadblock to detect license and registration violations; dismissal of DWI charge affirmed based on absence of statutory authority; exceptionally broad holding not apparently dependent upon any particular remediable set of roadblock procedures); *State v. Schroeder*, 66 Or. App. 754, 675 P.2d 1111, *petition for review denied*, 296 Or. 648, 678 P.2d 1227 (1984) (en banc) (denial of motion to suppress evidence affirmed; illuminating dissent to denial of petition for review by former professor and now Justice Linde).

Thus, the differences not merely in result, but in the standards to be imposed upon the state, are evident even in the state cases post-dating *McLaughlin*. In light of cases such as *Scott* and *Smith*, it can easily be argued that the cases since *McLaughlin* have polarized even further along crucial dimensions, and that Indiana must at some point take a position on the key questions not reached in *McLaughlin*. It should be noted that there is essentially no helpful prior Indiana authority, although the court in *Irwin v. State*, 178 Ind. App. 676, 681, 383 N.E.2d 1086, 1089 (1978), suggested in dicta that “no one questions the right of law enforcement officers to establish a roadblock to conduct a routine traffic check of all vehicles and drivers passing through that point during a given period of time.”

¹⁸471 N.E.2d at 1137.

¹⁹*Id.*

²⁰This would not itself be an instance of judicial notice, as judicial notice is typically thought of in terms of fact, rather than evaluation of fact. *See, e.g., Glover v. Ottinger*, 400 N.E.2d 1212, 1214 (Ind. Ct. App. 1980).

²¹Matters such as the detection or deterrence value, or the superiority of intoxication roadblocks are subject to reasonable dispute. *See H. ROSS, DETERRING THE DRINKING DRIVER* 110 (1982). As such, they are to be established by evidence rather than judicial notice. *See, e.g., Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 716, 433 P.2d 732, 747, 63 Cal. Rptr. 724, 739 (1967) (en banc).

Second, it must be asked whether the court is in fact moving toward simply assuming the adequacy of traditional means of detecting intoxication. The court observed that "[n]o doubt, police officers are well trained to identify such indicators as weaving between lanes, failing to signal a turn, speeding, etc."²² The assumption that the police are capable of non-intrusively detecting drunken drivers with some accuracy is certainly widely held.²³ This confidence, however, is probably misplaced.²⁴ No legal harm follows from any such false assumption, though, if detection of drunk drivers is no easier at roadblocks than through ordinary patrolling.²⁵

The court in *McLaughlin* concluded its analysis of the second *Brown* element by determining that a potential state interest in deterring, as opposed to detecting, drunken driving was "not present in this case."²⁶ Certainly, the state made no substantial attempt to establish empirically the magnitude of any deterrent effect. The court should, however, have found the relative deterrent effect of the roadblock program in question to have been unproven, rather than apparently assuming the deterrence effect to be non-existent. While it is true that the police did not widely publicize in advance the roadblock program's general features²⁷ in order

²²471 N.E.2d at 1137.

²³See, e.g., *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (en banc); *People v. Bartley*, 125 Ill. App. 3d 575, 578, 466 N.E.2d 346, 348 (1984) ("[a]n intoxicated motorist can be easily discerned by a trained officer without having to stop all traffic at a roadblock"), *criticized*, *People v. Conway*, 135 Ill. App. 3d 887, 482 N.E.2d 437 (1985), *rev'd*, *People v. Bartley*, No. 60593 (Ill. Nov. 21, 1985); *State v. Deskins*, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (1983) (Prager, J., dissenting); *State v. Cloukey*, 486 A.2d 143, 147 (Me. 1985).

²⁴See Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123, 159 n.199 (1984). See also *id.* at 158 (estimate that 7-8% of those driving at night are legally intoxicated), & 162 (estimate that for every 2,000 trips taken by drunk drivers, only one will result in single arrest). It is difficult to imagine how the probability of arrest could be 0.00044 if signs of driving while intoxicated were readily detectable by trained persons using non-intrusive means. See M. ROSS, *DETERRING THE DRUNK DRIVER* 107 (1982).

²⁵See, e.g., *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 2, 663 P.2d 992, 993 (1983) (en banc) (5,763 vehicles stopped at roadblocks; 13 DWI arrests); *State v. Deskins*, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (1983) (between 2,000 and 3,000 vehicles stopped; 15 DWI arrests) (Prager, J., dissenting); *People v. Scott*, 63 N.Y.2d 518, 523, 528 n.3, 473 N.E.2d 1, 2, 5 n.3, 483 N.Y.S.2d 649, 650, 653 n.3 (1984) (evidence that ten percent of drivers intoxicated during prime weekend late evening hours, but roadblocks conducted largely during these hours resulted in fewer than 1/10 of one percent being arrested for DWI). The ratio was somewhat better in *Jones v. State*, 459 So. 2d 1068, 1079 (Fla. Ct. App. 1984), where five or six DWI arrests resulted from the roadblock stop of between only 100 and 200 cars. This ratio was roughly matched by the particular roadblock at issue in *McLaughlin*, where three DWI arrests resulted from the stopping of 115 cars over the period of an hour. 471 N.E.2d at 1137.

²⁶471 N.E.2d at 1138.

²⁷*Id.*

to maximize deterrence, it is certainly conceivable that a series of "eight to ten roadblocks in Tippecanoe County during September, 1982"²⁸ would, without additional official publicity, generate at least a localized, temporary deterrent effect based solely on word of mouth communication. All that may be required for deterrence is the perceived possibility of the roadblock's recurrence, not official advance notice.²⁹

The remainder of the dozen factors listed in *Deskins* were discussed, finally, in connection with the third element of the *Brown* test, the severity of the interference with the defendant's liberty caused by the seizure in question.³⁰ The court did not find this factor to be decisive. The court found that

the objective intrusion on the detained motorists' fourth amendment rights was relatively low; the subjective intrusion caused by the physical characteristics of this roadblock was somewhat higher, due to its isolated location, questionable lighting, and absence of warning signs; and the perceived and actual discretion left to the officers in the field was adequately controlled. . . .³¹

It does seem clear that the presence or absence of these factors should not be examined with equal degrees of scrutiny. There is, for example, no excuse for failure to post illuminated warning signs indicating the precise purpose of the impending stop. The cost in money, or in detection or deterrence, is certainly minimal, and the benefit in reduced driver anxiety is clearly significant.³²

On the other hand, factors such as the most expeditious location for the roadblock, or even the appropriate degree of lighting, should be judicially reviewed only with great restraint, out of deference to the professional and technical expertise of the police. The police have no obvious incentives to locate the roadblock frivolously in unproductive locations. They may well be confronted with a delicate tradeoff between the productivity of the roadblock and the safety of all those concerned.³³

²⁸*Id.* at 1137 n.6.

²⁹While advance notice of the precise time and place of roadblocks maximizes neither apprehension nor deterrence, advance publicity of a more general nature may maximize deterrence while resulting in a lesser reduction in apprehension. Some degree of tradeoff between deterrence and apprehension may be inevitable, and the state should be wary of designing a roadblock program in an effort to accomplish both purposes, lest it be unable to demonstrate the superiority of roadblocks in either respect. See *Jones v. State*, 459 So. 2d 1068, 1076 (Fla. Ct. App. 1984).

³⁰471 N.E.2d at 1138.

³¹*Id.* at 1141.

³²The court in *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (en banc) noted a lack of warning signs or advance flashing lights and inferred an unnecessary degree of driver surprise.

³³Safety is the seventh *Deskins* factor cited in *McLaughlin*, 471 N.E.2d at 1135, and

Judicial attempts at second-guessing such determinations would seem generally unnecessary.³⁴

The court in *McLaughlin* determined that the level of actual and perceived operational discretion involved fell within acceptable limits because the roadblock was conducted pursuant to "previously specified neutral criteria"³⁵ and because "every car that arrived at the roadblock site was stopped."³⁶ The balance of the third *Brown* factor was thus not itself adverse to the state.³⁷

However, the overall balance of the three factors in *Brown* dictated the affirmance of the trial court order granting the defendant's motion to suppress. The state in *McLaughlin* was held to have "failed to meet its burden of proving the reasonableness of the warrantless seizure of defendant. . . ."³⁸ There was a fatal absence of evidence for the superiority, in terms of detection or deterrence, of the roadblock method.³⁹ The court concluded by warning in dicta that a showing by the state of a deterrent effect of roadblocks generated by advance publicity should take account of the possibility that a similar publicity blitz associated with traditional procedures to detect and deter drunk drivers used in an intensified manner would be equally productive.⁴⁰

a concern for safety may account for any "isolation" of the roadblock, as found in *id.* at 1141.

³⁴The Supreme Court has said in a somewhat different context that "[w]e may assume that . . . officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

³⁵471 N.E.2d at 1141 n.8, in accordance with *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

³⁶471 N.E.2d at 1139. A number of the cases involve what could easily appear to be arbitrary selection from the driver's standpoint, such as stopping every third or fifth car, or allowing enough cars to pass to avoid undue congestion, but such practices are generally not condemned. *See, e.g.,* *People v. Scott*, 63 N.Y.2d 518, 526, 473 N.E.2d 1, 4, 483 N.Y.S.2d 649, 652 (1984) (citing authority).

³⁷It should be noted that the courts often further subdivide their inquiry into the subjective intrusiveness of the roadblock by considering such questions, inspired by *Martinez-Fuerte*, 428 U.S. at 558, as whether the driver could "see visible signs of the officers' authority." *See McLaughlin*, 471 N.E.2d at 1139. *See also* *State v. Golden*, 171 Ga. App. 27, 29, 318 S.E.2d 693, 695 (1984); *People v. Torres*, 125 Misc. 2d 78, 82, 478 N.Y.S.2d 771, 774 (Crim. Ct. 1984). Until police roadblocks are conducted in unmarked police vehicles, or unauthorized highway brigandage becomes more prominent, this factor may safely be dropped from consideration.

³⁸471 N.E.2d at 1141. *See also* *State v. Goins*, 16 Ohio App. 3d 168, 172, 474 N.E.2d 1219, 1222 (1984) (inquiry into police "reasonableness" under all of the circumstances of the checkpoint).

³⁹471 N.E.2d at 1141.

⁴⁰*Id.* at 1142. It is not settled whether a proper balancing would compare the effects of a roadblock program against those of a particularly "concentrated effort" using traditional techniques. Presumably, no roadblock will be as effective as the police's ignoring all other tasks, but using only traditional means, to detect drunk drivers.

In view of the state's failure to adduce any evidence on the question of the relative efficacy of roadblocks, or to advance any public interest other than detection and apprehension, it is clear that *McLaughlin* raises far more questions than it answers.

Crucial questions, such as the kinds of evidence that are acceptable, and the nature of the weighing process involved in passing on questions of relative effectiveness, remain unanswered. It is unclear how the courts will react to masses of conflicting statistical data, and how they will review trial court findings on such potentially complex empirical questions.

As the perceived difficulty of evaluating the statistical evidence of the relative efficacy of roadblock detentions threatens to become unmanageable, though, the courts are under greater pressure simply to cut, rather than painstakingly unravel, the Gordian knot of statistical evidence. The First District of the Indiana Court of Appeals has recently taken just this tack, disagreeing with *McLaughlin*, in *State v. Garcia*.⁴¹

In *Garcia*, the court of appeals reversed the trial court's granting of the defendant driver's motion to suppress evidence of his driving while intoxicated where the evidence was obtained through a procedurally well-conducted temporary roadblock.⁴² Most of the numerous *Deskins* factors⁴³ were found favorably to the state, and during the two-hour operation of the roadblock, the stopping of approximately 100 vehicles netted seven DWI arrests.⁴⁴

The essential difference between *Garcia* and *McLaughlin* is the unwillingness of the *Garcia* court to consider the relative efficacy of the roadblock in question as contrasted with more traditional and less intrusive means of enforcing drunk driving laws.⁴⁵

The court in *Garcia* was concerned largely with the presence or absence of "unbridled discretion and standardless conduct of an officer in the field"⁴⁶ and saw the crucial constitutional task as simply one of striking "a balance between the public interest in highway safety, which includes ridding the roads of drunk drivers, and the individual's right to personal security from arbitrary interference by law officers."⁴⁷

What the court in *Garcia* did not acknowledge is that the concern for "the degree to which the seizure advances the public interest" in

⁴¹481 N.E.2d 148 (Ind. Ct. App. 1985).

⁴²*Id.* at 154. The roadblock in *Garcia* may have had better advance general publicity than that involved in *McLaughlin*, *cf. supra* note 27 and accompanying text, but the court in *Garcia* did not rest its analysis on this distinction.

⁴³*See* 481 N.E.2d at 152-53 in the context of *supra* note 7 and accompanying text.

⁴⁴*Id.* at 150.

⁴⁵*See id.* at 153-54.

⁴⁶*Id.* at 152.

⁴⁷*Id.*

reduced highway carnage derives ultimately from the language of the United States Supreme Court,⁴⁸ and that a fair reading of this requirement leaves the limitation of police arbitrariness and discretion as a "central," but not exclusive, concern.⁴⁹

No one denies that roadblock procedures are more intrusive than traditional procedures under which a driver whose conduct gives no grounds for reasonable articulable individualized suspicion may generally proceed unmolested by the authorities. The concern of the *McLaughlin* court, as opposed to the *Garcia* court, is that this greater intrusiveness on fundamental individual constitutional rights be counterbalanced by a showing that the roadblock in question has some compensating advantage. The logic of *McLaughlin* in interpreting *Brown* is that there is no point in countenancing exceptionally burdensome law enforcement techniques if those techniques are no more efficacious, or even less efficacious, than less burdensome techniques.

Defenders of the *Garcia* approach can offer several reasonable responses in addition to noting the potential difficulties inherent in having the courts grapple with competing statistical analyses. There is undoubtedly a distinction that should be respected between dictating police techniques and dictating constitutional limitations on police techniques.⁵⁰ It is also possible to argue that the "obvious failure of the so-called traditional methods"⁵¹ should give rise to some presumption that alternative techniques, including roadblocks, will be more effective. A plea for time to develop adequate statistics for comparative purposes can be made,⁵² although this controversially assumes that the welter of currently available statistics is legally inadequate to settle the issue, even temporarily, until better statistics can be developed to resolve the empirical questions more definitively.

What should clearly be resisted, though, is any temptation to eyeball the number of arrests per hour,⁵³ or even per officer per hour, or the phenomenon of drivers' avoiding the roadblock by turning around,⁵⁴ and assume that superior deterrence has been shown or that it can be inferred that the *McLaughlin* approach results in unnecessary highway tragedies.⁵⁵

⁴⁸*Brown v. Texas*, 443 U.S. 47, 50-51 (1979). It is unclear how roadblocks would advance the public interest at all if it were to be conceded that they were less effective than equally intense use of traditional techniques.

⁴⁹*Id.* at 51.

⁵⁰*Cf. Garcia*, 481 N.E.2d at 152.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.* at 154.

⁵⁴*Id.*

⁵⁵*See id.*

The ultimate criticism of the *Garcia* approach remains that it imposes obvious costs in civil liberties without any assurance of compensations in increased public safety. The issue is not the magnitude or difficulty of the drunk driving problem, but the avoidance of incurring potentially pointless losses of basic civil liberties. The Indiana Supreme Court may eventually adopt the *Garcia* approach based on practical considerations. This Article, however, will not assume so, as this would be a virtually unique instance of applying what amounts to merely a due process "rational basis" test with respect to the substantial burdening of fundamental rights and civil liberties.⁵⁶

It is sometimes suggested that either the legislature or the attorney general should promulgate uniform roadblock operational standards.⁵⁷ The value of this step is unclear, given the unsettled state of Indiana law in this regard. The thirteen factors enumerated in *Deskins* provide some guidance.⁵⁸ Adherence to statutory or administrative guidelines would not guarantee constitutionality, and departure from the guidelines would not necessarily result in an unconstitutional seizure.

In the absence of decisive, methodologically unimpeachable, uncontradicted, and plainly applicable controlled studies, it is also unclear whether the state should abandon its detection and apprehension rationale and focus instead on building a technically sound case for the relative deterrence value, at least over the short term,⁵⁹ of its roadblock program. While the cases do not permit a rigorous comparison of the cost-effectiveness of roadblocks and of routine patrolling, the productivity in terms of detection and apprehension per police officer-hour of roadblocks may well not exceed that of conscientious routine patrolling, other things being equal.⁶⁰

This is not to suggest that the unique deterrence value of roadblocks is easy to establish, although some courts have been satisfied in this regard.⁶¹ Indiana has not yet determined how deeply the courts will

⁵⁶This is, of course, not to suggest that there is no authoritative support for the *Garcia* approach in this particular area. One of the most recent such cases is *State v. Martin*, 496 A.2d 442 (Vt. 1985), in which the Vermont Supreme Court simply assumed some level of deterrence attributable to the roadblock, and seemed disinclined to require any sort of a showing of any greater deterrence flowing from the roadblock technique than from less intrusive techniques. *Id.* at 447-48.

⁵⁷See, e.g., *State v. Deskins*, 234 Kan. 529, 543, 673 P.2d 1174, 1185-86 (1983); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983).

⁵⁸*Deskins*, 234 Kan. at 541, 673 P.2d at 1185.

⁵⁹For a variety of drunk driver programs, longterm effects have been hard to demonstrate. See M. ROSS, *DETECTING THE DRUNK DRIVER* 103 (1982).

⁶⁰See the examples cited at *supra* note 25.

⁶¹See, e.g., *State v. Superior Court*, 143 Ariz. 45, 48, 691 P.2d 1073, 1076 (1984); *Little v. State*, 300 Md. 485, 504, 479 A.2d 903, 913 (1984). The dissenting opinion in *Little* is cogently argued in this regard.

plunge into the task of sifting out methodologically flawed statistical studies from the welter of inconsistent claims.

Even such preliminary tasks as determining whether a study from another time and jurisdiction should be accorded substantial weight as evidence of a deterrent effect of an Indiana program present formidable difficulties. Just as the courts may wish to discourage litigation based on only minimal departures from an optimally conducted roadblock, so they may wish to avoid having every roadblock case turn into a battle of statisticians. From this standpoint, it is tempting to adopt New York's "reasonable basis" test,⁶² rather than rigorously pursuing the difficult question of the roadblock's identifiable deterrence value.

The temptation to simplify the inquiry by moving closer to a minimum scrutiny equal protection or substantive due process standard⁶³ should be resisted. In roadblock cases, it should be recalled that the state is ultimately seeking to impose a criminal sanction and to engage in procedures which specially burden the privacy and travel rights of numerous innocent drivers.⁶⁴ It is doubtful that such an intrusion should be permitted merely because there is a "reasonable basis"⁶⁵ for believing that there is some practical reason for doing so.

Unfortunately, the process of avoiding extreme and obviously flawed solutions may not help the courts to crystallize a uniquely justifiable moderate approach. A moderate standard, though, should include judicial deference to most limited departures from allegedly optimal roadblock procedures.⁶⁶ Beyond this obvious step to discourage undue litigation, the decisions could reasonably take various directions.

One approach to the knotty problem of duly weighing conflicting statistical evidence on the claimed superior deterrence effect of roadblock programs would start by generally admitting into evidence otherwise competent studies from jurisdictions other than Indiana.⁶⁷ Methodological criticisms of such studies should generally go to their evidentiary weight, and not to their admissibility.⁶⁸ Techniques should be devised to minimize

⁶²See *People v. Scott*, 63 N.Y.2d 518, 529, 473 N.E.2d 1, 6, 483 N.Y.S.2d 649, 654 (1984).

⁶³See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201 (1976); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124-25 (1972).

⁶⁴See generally Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123 (1984). See also *State v. Schroeder*, 296 Or. 648, 649, 678 P.2d 1227, 1228 (1984) (Linde, J., dissenting to denial of petition for review).

⁶⁵See *supra* note 49 and accompanying text.

⁶⁶See *supra* notes 32-34 and accompanying text.

⁶⁷National, as opposed to exclusively New York-based, statistics were apparently examined and relied on for at least limited purposes in *People v. Scott*, 63 N.Y.2d 518, 526-27, 473 N.E.2d 1, 4, 483 N.Y.S.2d 649, 652 (1984).

⁶⁸See MCCORMICK ON EVIDENCE §§ 208, 209 (E. Cleary 3d ed. 1984). For a general

any necessity for continually relitigating the validity of leading studies as roadblock cases continue to arise nationally.

The critical superior deterrence effect issue might best be resolved through the following judicial standard: if the statistical evidence as to the alleged detection or deterrence superiority of intoxication roadblocks remains substantially irreconcilable, conflicting, or inconclusive after full opportunity for cross-examination and adversary commentary, or if the state's own evidence by itself is judicially deemed to be unduly impressionistic, anecdotal, or materially deficient, the state has not discharged its burden of justifying the special intrusiveness of the intoxication roadblock.⁶⁹ One can only hope that additional empirical studies will simplify, rather than further complicate, the question.

introduction to some of the statistical techniques relevant to adjudicating claims of deterrence value, see Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980). While competent statistical analysis cannot by itself resolve the underlying issues of public policy, McCORMICK, *supra* at 646 ("Deciding what level of confidence is appropriate in a particular case . . . is a policy question and not a statistical issue"), some courts in other contexts are beginning to insist upon statistical methodologies more sophisticated than those commonly employed thus far in roadblock cases. See, e.g., *Moultrie v. Martin*, 690 F.2d 1078, 1082 (4th Cir. 1982) ("in all cases involving racial discrimination, the courts of this circuit must apply a standard deviation analysis . . . before drawing conclusions from statistical comparisons"). Of course, it is possible that roadblocks either invariably or never have superior apprehension or deterrence effects, where no such firmly established broad principle can be applied in individual racial discrimination cases.

⁶⁹The point is in part to control the demands on judicial technical expertise while avoiding merely speculative or intuitive conclusions on the relative effectiveness of the roadblocks.

Summary Driver's License Suspensions

R. GEORGE WRIGHT*

In *Ruge v. Kovach*,¹ the Indiana Supreme Court rejected a procedural due process challenge to the Indiana statutory² procedures providing for pre-hearing suspension of the driver's license of any person arrested after being found by chemical testing to have been driving with a blood alcohol level of .10 percent or greater.³ The court held, largely in view of the statutory requirement of a pre-suspension independent judicial determination of probable cause⁴ and a "prompt" post-suspension judicial hearing,⁵ that the statute afforded all the process that was due.

The supreme court set the standard of review in *Ruge* by determining that the Code chapter involved⁶ was administrative or civil in nature, and not criminal,⁷ and that while the "entitlement" of a driver's license rose to the level of a protectible property interest,⁸ no fundamental right was implicated by the statute.⁹

The court was then able to resolve the due process question by examining the United States Supreme Court's analyses in *Mackey v. Montrym*¹⁰ and *Dixon v. Love*¹¹ and applying the well-known balancing test mandated by *Mathews v. Eldridge*.¹² While the driver's interest in

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¹467 N.E.2d 673 (Ind. 1984).

²IND. CODE §§ 9-11-1-1 to -4-15 (Supp. 1985).

³A pretrial license suspension may also stem from a driver's refusal to submit to a chemical test for alcohol, but this circumstance was not presented in *Ruge*. A refusal to submit to testing was instead present in the leading pre-hearing license suspension case, *Mackey v. Montrym*, 443 U.S. 1 (1979), which rejected a due process challenge against a Massachusetts statute. *Id.* at 19.

⁴See 467 N.E.2d at 676-77.

⁵See *id.* at 681. See also *Roberts v. State*, 474 N.E.2d 144, 147 (Ind. Ct. App. 1985) (interpreting *Ruge* in the context of a refusal to submit to testing).

⁶IND. CODE § 9-11-4 (Supp. 1985).

⁷467 N.E.2d at 677 (citing prior Indiana cases). See also *Szczzech v. Comm'r of Pub. Safety*, 343 N.W.2d 305, 306 (Minn. Ct. App. 1984) (holding a comparable Minnesota statute to be remedial and nonpenal on the grounds that it was intended for the public protection).

⁸467 N.E.2d at 678 (citing cases). See also *Illinois v. Batchelder*, 463 U.S. 1112 (1983).

⁹467 N.E.2d at 677-78 (citing cases). See also *Hernandez v. Dep't of Motor Vehicles*, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981).

¹⁰443 U.S. 1 (1979).

¹¹431 U.S. 105 (1977) (holding constitutional an Illinois statute allowing pre-hearing license suspensions upon a showing of repeated traffic offense convictions).

¹²424 U.S. 319 (1976). *Eldridge* balancing requires a judicial consideration of:

operating his vehicle pending a full hearing was recognized as substantial,¹³ a prompt post-suspension review¹⁴ and the statutory provision for granting of a "hardship license"¹⁵ minimized the weight of the driver's interest.¹⁶

The risk of an erroneous deprivation of a driver's property interest in his license under the Indiana statutory procedure was then held to be acceptable. In particular, the court held that "the chemical test required by our statute represents a 'reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.'"¹⁷

Finally, the court determined the governmental interest underlying the challenged statute to be a "most compelling interest in highway safety and public welfare,"¹⁸ specifically, the interest "in keeping its highways safe by removing drunken drivers from [Indiana's] roads."¹⁹ On this basis, the supreme court reversed the trial court and held the summary license suspension statute constitutional.²⁰

In its reasoning and result, *Ruge* is clearly within the mainstream of the developing constitutional law.²¹ Particularly in view, though, of

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

¹³467 N.E.2d at 678-79.

¹⁴*Id.* at 679.

¹⁵*Id.* (citing IND. CODE § 9-5-2-1 (1982)).

¹⁶467 N.E.2d at 679.

¹⁷*Id.* at 680 (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)).

¹⁸467 N.E.2d at 681.

¹⁹*Id.*

²⁰*Id.*

²¹In addition to those cases cited in *Ruge*, at least general support for *Ruge* can be found, under varying facts and statutes, in *Gonzales v. Franklin County Mun. Court*, 595 F. Supp. 382, 388 (S.D. Ohio 1984) (upholding Ohio pre-hearing license suspension statute on due process challenge in posture of request for preliminary injunction against its enforcement); *McCracken v. State*, 685 P.2d 1275 (Alaska Ct. App. 1984) (conviction for refusal to take breathalyzer test upheld under constitutional challenge); *Hernandez v. Dep't of Motor Vehicles*, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981) (upholding on minimum scrutiny basis California statute authorizing six-month license suspension for refusal to submit to a chemical test); *Garrett v. Dep't of Pub. Safety*, 237 Ga. 413, 228 S.E.2d 812 (1976) (upholding constitutionality of Georgia implied consent law permitting license revocation upon refusal to submit to chemical intoxication test); *In re Application of Ventura*, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (1981) (rejecting due process challenge to pre-hearing suspension of driver's license for refusal to submit to chemical test; hearing required within fifteen days of suspension); *Kobilansky v. Liffbrig*, 358 N.W.2d 781 (N.D. 1984) (upholding pre-hearing license suspension against due process challenge); *State v.*

the popular interest that has recently developed in policy issues implicated in *Ruge*,²² it is important to retrace the logical steps taken by the *Ruge* court.

There is ample support, first, for the court's view of implied consent and summary license suspension procedures as civil or administrative in nature, and not criminal.²³ This support in the law, however, does not make the distinction less obscure. It should be obvious that a statute that is deemed civil because intended for public protection may just as easily be classified as criminal in nature because it is aimed at deterring the commission of crime or apprehending lawbreakers. Certainly the stigma and gravity of consequences attached to the loss of one's driver's license may well exceed that attached to being found in violation of, for example, building code requirements in an administrative hearing. The courts, therefore, should not rely too heavily on this distinction.²⁴

The court concluded its analysis of the appropriate standard of review by determining that there exists no fundamental right to drive, nor a fundamental right to drive based either upon a fundamental right of employment or on the fundamental right of interstate travel.²⁵ The court's finding of no burdening of the acknowledged fundamental right to travel²⁶ was perhaps unduly facilitated by its imposing a literally

Locke, 418 A.2d 843 (R.I. 1980) (similarly upholding statute); *City of Columbus v. Adams*, 10 Ohio St. 3d 57, 461 N.E.2d 887 (1984) (denying immediate appellate review of pretrial suspension of driver's license due in part to perceived social benefit of early elimination of the risk of harm if defendant is ultimately convicted). Apparently, no currently viable reported precedent is inconsistent with the holding in *Ruge*.

²²For a noteworthy instance of potential trial ramifications, see *State v. Franklin*, 327 S.E.2d 449, 454-55 (W. Va. 1985) (conspicuous trial attendance of anti-drunk driving group members led to reversal of conviction).

²³See *supra* note 7. See also Reese & Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313, 317 n.26 (1983).

²⁴The administrative-criminal dichotomy is employed in *Davis v. State*, 174 Ind. App. 433, 367 N.E.2d 1163 (1977) (proceeding to revoke driver's license is administrative, and not criminal; therefore, there is no right to counsel). See also *Steward v. State*, 436 N.E.2d 859 (Ind. Ct. App. 1982) (no right to counsel until arrest for refusal to take chemical test or failing test for alcohol); *Dep't of Pub. Safety v. Gates*, 350 N.W.2d 59 (S.D. 1984) (no constitutional right to consultation with an attorney prior to decision to take blood test). But see *Heddan v. Dirkswager*, 336 N.W.2d 54, 57 (Minn. 1983) (en banc) (judicial requirement of reasonable opportunity to consult counsel before deciding whether to take test). Relatedly, it has been held that there is no constitutional mandate to advise a driver of the possibly severe legal consequences of his failure to consent to a breathalyzer test. See *People v. Honaker*, 127 Ill. App. 3d 1036, 469 N.E.2d 1120 (1984). Cf. *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (no infringement of right against self-incrimination in admission into evidence of defendant's refusal of blood alcohol test). But cf. *Heddan v. Dirkswager*, 336 N.W.2d 54, 57 (Minn. 1983) (en banc) (statutory requirement that police notify driver of the consequences of submitting or not submitting to test).

²⁵467 N.E.2d at 677-78. See also *supra* note 9.

²⁶The leading case is the well-known *Shapiro v. Thompson*, 394 U.S. 618 (1969).

undemanding test — specifically, that the license suspension “not necessarily curtail” the licenseholder’s freedom of interstate movement.²⁷ Of course, few constitutionally illegitimate infringements of fundamental rights would fail this test; certainly, the welfare regulations struck down in *Shapiro v. Thompson* did not “necessarily curtail” any given individual’s freedom to move to Illinois.²⁸

Ultimately, though, there is no objection to finding no fundamental constitutional rights to be at issue in this case, as long as it is appropriately recognized that the “entitlement” of driving is often fundamental in a practical sense. The United States Supreme Court has recognized that “[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities.”²⁹ This unquestionable premise should be given due weight in any balancing of individual and social interests.

In addition, the interest balancing undertaken by the court should recognize that because of the nature of the interests identified, summary suspension cases must inevitably tend to be difficult. To maximize the social interest in safe highways, it is alleged, drunken drivers must quickly and uniformly be denied access to the highways.³⁰ But to carry out this policy is simultaneously to maximize the individual driver’s stake in the outcome, and hence his due process interest. Indiana recognizes this individual interest by providing for a “hardship license.”³¹ But any accommodation of the driver’s practical interests tends to undercut the certainty and uniformity of preventing drunken driving.³² In its plainest form, the dilemma is that providing temporary or hardship licenses does not assist in “removing drunken drivers” from the roads.³³

The second interest-balancing factor, the “likelihood of an erroneous deprivation of the private interest involved,”³⁴ is better conceived as a comparative inquiry into the difference in the likelihood of error under pre- and post-deprivation systems. What is crucial is not whether the hearing occurs pre- or post-deprivation, but the opportunity to prepare for the hearing, to marshal arguments, and to compel the attendance of and cross-examine witnesses. If the quality of the hearing is unrelated to its pre- or post-deprivation character, there is probably no harm done

²⁷467 N.E.2d at 678.

²⁸See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁹*Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

³⁰467 N.E.2d at 681.

³¹*Id.* at 679 (citing IND. CODE § 9-5-2-1 (1982)). Cf. *Heddan v. Dirkswager*, 336 N.W.2d 54, 60 (Minn. 1983) (en banc) (providing for an automatic seven-day temporary license at the time of license revocation).

³²See, e.g., Reese & Borgel, *Summary Suspension of Drunken Drivers’ Licenses—A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313, 324 n.65 (1983).

³³467 N.E.2d at 681.

³⁴*Id.* at 679.

by the court's holding, on the risk of erroneous deprivation factor, merely that "the chemical test required by our statute represents a 'reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.'"³⁵

The third and final balancing factor considered in *Ruge* was the nature and magnitude of the public interest at stake.³⁶ The error that courts should avoid in this regard is conceiving of the public interest as, along with avoiding administrative and fiscal costs, the generalized importance of safe highways or "removing drunken drivers" from the roads.³⁷ This approach loses sight of the comparative nature of the due process balancing. The issue is the relative merit of pre- and post-suspension hearings. Even if it is assumed that the post-suspension hearing system contributes in some measure toward achieving the safety goal, this does not by itself establish the degree of superiority of the post-suspension system over the pre-suspension hearing procedure with respect to improving highway safety.

The court in *Ruge* cited the Supreme Court decision in *Mackey* for the view that the pre-hearing suspension procedure was "critical" to achieving the public interest at stake.³⁸ *Ruge* quoted *Mackey* to the effect that "[s]tates surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or

³⁵*Id.* at 680 (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)). While infallibility is not a requirement of due process, both the factual determinations that a given driver has failed the breathalyzer test, and the apparently more clear-cut determination that he has refused to take the test, are often subject to some question. The reliability of the breathalyzer in this context is defended in *Commonwealth v. Neal*, 392 Mass. 1, 464 N.E.2d 1356 (1984); *Heddan v. Dirkswager*, 336 N.E.2d 54 (Minn. 1983) (en banc); *Romano v. Kimmelman*, 96 N.J. 66, 474 A.2d 1 (1984); *State v. Suping*, 312 N.C. 421, 323 S.E.2d 350 (1984). Some of the risks associated with at least the most commonly used breathalyzer models are referred to in *Walker v. State*, 454 N.E.2d 425, 428 (Ind. Ct. App. 1983) (discussing literature indicating susceptibility of Smith & Wesson Model 900A to radio interference); *Denman v. State*, 432 N.E.2d 426, 430 (Ind. Ct. App. 1982) (discussing degree of complexity of breathalyzer operational checklist). See also *Hampton v. State*, 468 N.E.2d 1077, 1079 (Ind. Ct. App. 1984) (discussing case of defendant who could not coherently answer questions of police, appeared unsteady on his feet, and who smelled of alcohol, but registered .00 on his breathalyzer test).

Even the question of whether a person has refused a breathalyzer examination is often not free from doubt. The courts are split, for example, on whether the refusal to submit must be express, or may be inferred under the circumstances. See *People v. Carlyle*, 130 Ill. App. 3d 205, 209, 474 N.E.2d 9, 11-12 (1985) (citing cases). See also *Thacker v. State*, 441 N.E.2d 708 (Ind. Ct. App. 1982) (verbal consent to test vitiated by driver's belligerent behavior impeding or threatening to impede test) (decided under prior "knowing refusal" statute).

³⁶467 N.E.2d at 680.

³⁷See *id.* at 680-81.

³⁸*Id.* at 681 (citing *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979)).

destroying spoiled foodstuffs.' ”³⁹ Finally, *Mackey* was quoted for a number of empirical arguments for the deterrence value, or the superior deterrence value, of summary suspensions, and for the cost and delay of a pre-suspension hearing procedure.⁴⁰

Troublesome here is that questions of deterrence, or of whether a given procedure is a significantly better deterrent than a different procedure, are inescapably empirical questions, to be resolved by evidence and statistical analysis of at least an informal sort, and not by appeal to Supreme Court text or by judicial notice. The court in *Ruge* discussed the public interest factor with no explicit attention to such matters as which party bore the burden of production and of proof, or how such burdens could be discharged, or the degree of deference owed the trial court.

It is at least conceivable that the extent of drunken driving does not significantly depend upon whether the required hearing takes place prior to the suspension or within twenty days thereafter. It is entirely plausible that a far more crucial factor is the perceived probability of being caught and receiving any significant sanction at all, perhaps in conjunction with the severity of the punishment inflicted, independent of the timing of the punishment.⁴¹

The evidence in support of the empirical conclusions adopted by the court in *Ruge* is tenuous at best.⁴² This is not to suggest that the state should not be accorded wide latitude to experiment reasonably with techniques to reduce the level of drunken driving.⁴³ But the state should be encouraged to maximize the quality of its evidentiary presentation, lest the due process balancing be an entirely intuitive, arm-chair process.⁴⁴

³⁹467 N.E.2d at 681 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979)).

⁴⁰467 N.E.2d at 681 (quoting *Mackey v. Montrym*, 443 U.S. 1, 18 (1979)).

⁴¹See L. ROSS, DETERRING THE DRINKING DRIVER 102-15 (1982). Professor Ross is able to conclude, based on a thorough examination of the available scientific literature, that “[c]hanges in the law promising increased certainty or combined certainty and severity of punishment reduce the amount of drinking and driving.” *Id.* at 102-03. With implications for summary suspension procedures, Ross concludes that “virtually no evidence illustrates, one way or the other, the effect of celerity or swiftness of punishment.” *Id.* at 104.

The evidence clearly shows that the probability of an accident while driving impaired is minimal, and that the probability of arrest is also minuscule. The probability of arrest has been put at 0.00044. *Id.* at 107. As long as this probability remains vanishingly small, manipulating the timing of the suspension hearing may be futile.

⁴²See *supra* note 41.

⁴³*Mackey*, 443 U.S. at 17.

⁴⁴By contrast, consider the attention to quality of evidence and placement of the burden of production in *State v. McLaughlin*, 471 N.E.2d 1125, 1136-38, 1141-42 (Ind. Ct. App. 1984). Drawing analogies to mislabeled drug and spoiled foodstuff cases, as the United States Supreme Court and the court in *Ruge* have done, merely suppresses the difficulties inherent in predicting driver response. *Ruge*, 467 N.E.2d at 681 (citing *Mackey*, 443 U.S. at 17-18). In particular, spoiled food remains spoiled after a prehearing seizure.

The judicial aim should be to make the due process balancing as thoroughly informed as reasonably possible.⁴⁵

A drunken driver may not drive drunk again between his arrest and any subsequent judicial proceeding, or he may do so despite his suspended license.

⁴⁵It should also be noted that the United States Supreme Court's statement of its due process balancing test appears to vary subtly, depending perhaps on context. In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), the Court applied the *Eldridge* balancing and determined that a pre-termination hearing was required before the utility could discontinue residential utility service for alleged non-payment. *Id.* at 17-18. *Memphis Light* focused on the status of utility service as "a necessity of modern life," the risk of erroneous deprivation as "not insubstantial," and the utility's interests as "not incompatible" with granting a pre-deprivation hearing. *Id.* at 18. *Memphis Light* is also interesting for its analysis of *Dixon v. Love*, 431 U.S. 105 (1977), which upheld an Illinois statute providing for a pre-hearing suspension of a driver's license upon a showing of his repeated convictions for certain traffic offenses. While both *Mackey* and *Ruge* rely upon *Dixon*, *Memphis Light* points out the driver's obvious opportunity for a full judicial hearing on the merits at each of the trials resulting in the underlying traffic convictions. *Id.* at 19-20 n.24.

Public Policy and Antitrust Enforcement in the Health Care Industry

MILDRED L. CALHOUN*

I. INTRODUCTION

In recent years there has been a veritable flood of antitrust litigation in the health care field. Because of the unique nature of the health care industry and its importance to the quality of life of every American, antitrust enforcement in this industry has raised an unprecedented debate over the usefulness and/or desirability of antitrust enforcement in this field.

Two recent decisions arising in Indiana illustrate two of the many public policy questions generated in this area. These decisions are *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*¹ and *Marrese v. Interqual, Inc.*²

II. CHALLENGES TO PREFERRED PROVIDER ORGANIZATIONS

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance raises questions regarding the validity under the antitrust laws of so-called preferred provider organizations, commonly referred to as "PPO's." While the term PPO encompasses a wide variety of arrangements, a PPO is essentially a program where the preferred providers give favorable rates or terms to an employer, insurer, or other purchaser of health care services. The purchasers in turn create incentives for their members or insureds to use these "preferred providers" rather than other providers.³ PPO's are perceived to be one means of reducing costs in the health care industry.⁴

In *Ball Memorial*, the plaintiffs, eighty Indiana hospitals, challenged the legality of a preferred provider program that defendants Blue Cross of Indiana and Blue Shield of Indiana⁵ were planning to implement.

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¹603 F. Supp. 1077 (S.D. Ind. 1985), *affirmed*, No. 85-1481 (7th Cir. Mar. 4, 1986). Barnes & Thornburg represents one of the hospitals in this litigation on a counterclaim filed against it by the defendants.

²748 F.2d 373 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3501 (1985).

³For a more detailed definition of a PPO and the various types of arrangement the term includes, see T. FOX & A. WEISMAN, *PREFERRED PROVIDER ORGANIZATIONS* (1984).

⁴See, e.g., *Ball Memorial*, 603 F. Supp. at 1084.

⁵The actual defendants were Mutual Hospital Insurance, Inc., doing business as Blue

Among other things, the suit questioned the legality of the proposed plan under the provisions of both federal and state antitrust laws.⁶

The plaintiffs requested preliminary relief to prevent implementation of the PPO plan and also to prevent a proposed merger by the defendants. A hearing on the motion commenced January 7, 1985, and extended over a period of eleven days. On March 1, 1985, Judge Steckler of the Southern District of Indiana issued findings of fact and conclusions of law denying the preliminary relief. The Seventh Circuit affirmed the decision.⁷

The plaintiffs challenged the proposed PPO under both sections one and two of the Sherman Act and the corresponding provisions of the Indiana Code.⁸

A. Section One Challenge

Section one of the Sherman Act prohibits conspiracies in restraint of trade and prohibits many "classic" anticompetitive practices such as price fixing among competitors,⁹ market allocation among competitors,¹⁰ and concerted refusals to deal, otherwise known as group boycotts.¹¹

PPO's operated by insurance companies have been previously attacked as illegal price fixing agreements because the insurance company and the provider agree on the price to be charged the insured. However, courts have uniformly held this does not constitute illegal price fixing because the courts have characterized the insurance company, not the insured, as being the real purchaser of the health care services.¹²

Cross of Indiana and Mutual Medical Insurance, Inc., doing business as Blue Shield of Indiana.

⁶The antitrust claims alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), and sections 1 and 2 of the Indiana Anti-Monopoly Act, IND. CODE §§ 24-1-2-1, -2 (1982). The original complaint alleged violations of the Indiana Hospital Statutes, IND. CODE § 16-12.1-1-1 (1982). The complaint was filed November 14, 1984. The complaint was later amended to eliminate these claims. The amended complaint was filed March 8, 1985. In any event, the state hospital law claims were never before the court on the motion for preliminary relief.

⁷No. 85-1481, March 4, 1986.

⁸See *supra* note 6. The Indiana state antitrust laws are modeled on the federal laws and are interpreted accordingly. *Photomat Corp. v. Photovest Corp.*, 606 F.2d 704, 721 n.27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

⁹See, e.g., *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹⁰See, e.g., *United States v. Topco Associates*, 405 U.S. 596 (1972).

¹¹See, e.g., *Fashion Originator's Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

¹²See *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1978); *Brillhart v. Mutual Medicine Insurance, Inc.*, 768 F.2d 196 (7th Cir. 1985); *Sausolito Pharmacy, Inc. v. Blue Shield of California*, 544 F. Supp. 230, 233 (N.D. Cal.), *aff'd per curiam*, 677 F.2d 47 (9th Cir. 1981), *cert. denied*, 459 U.S. 1016 (1982).

Courts have routinely held it is not a violation of the antitrust laws for a buyer and seller to agree on what price the buyer will pay.¹³ Any other rule would wreak havoc on our economy because it is impossible for any commercial transaction to proceed without some agreement among the parties as to the price to be paid. Thus, Judge Steckler concluded there was little likelihood that plaintiffs' section one claim would be successful on the merits.¹⁴

B. Section Two Challenge: Abuse of Monopsony Power

The more interesting questions raised by this litigation involve the legality of the preferred provider organization under section two of the Sherman Act. Section two prohibits monopolization, which is defined as the willful maintenance or acquisition of monopoly power.¹⁵

The plaintiffs argued that Blue Cross/Blue Shield had violated section two by abusing its alleged *monopsony* power.¹⁶ While a monopolist possesses the power to raise prices above a competitive level to its customers, a monopsonist possesses the power to force its suppliers to lower their prices below competitive levels.¹⁷ Plaintiffs argued Blue Cross/Blue Shield possessed sufficient monopsony power to force the hospitals who supplied services to Blue Cross/Blue Shield to lower their prices to unremuneratively low levels and that this constituted a violation of section two of the Sherman Act.

Abuse of monopsony power is an unexplored frontier in antitrust law. Prior to *Ball Memorial*, at least one federal court had wrestled with the concept and concluded that unilateral monopsony pricing did not violate the antitrust law. That case, *Kartell v. Blue Shield of Massachusetts*,¹⁸ involved facts very similar to those in *Ball Memorial*. In *Kartell*, a group of physicians challenged an insurer's ban on balance billing. (Balance billing is the practice of billing the insured directly for amounts not covered by insurance). In *Kartell*, the insurance company prohibited this practice and this prohibition was challenged as, *inter alia*, a violation of section

¹³See, e.g., *Brillhart v. Mutual Medicine Insurance, Inc.*, 768 F.2d 196 (7th Cir. 1985); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981); *Sausolito Pharmacy, Inc. v. Blue Shield*, 544 F. Supp. 230, 235 (N.D. Cal.), *aff'd per curiam*, 677 F.2d 47 (9th Cir. 1981), *cert. denied*, 459 U.S. 1016 (1982).

¹⁴*Ball Memorial*, 603 F. Supp. at 1086.

¹⁵*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

¹⁶Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the Complaint at 7-24, *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 603 F. Supp. 1077 (S.D. Ind. 1985), *affirmed*, No. 85-1481 (7th Cir. March 4, 1986).

¹⁷See *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968); *Vogel v. American Society of Appraisers*, 675 F.2d 502, 601 (7th Cir. 1982).

¹⁸749 F.2d 922 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 2010 (1985).

two of the Sherman Act because it forced the doctors to accept unreasonably low prices.

The Second Circuit found monopsony pricing did not violate section two of the Sherman Act,¹⁹ relying on its earlier decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*,²⁰ in reaching this conclusion. In *Berkey Photo*, the Second Circuit held that monopoly pricing by a monopolist that had lawfully obtained its monopoly did not violate section two.²¹

The Second Circuit concluded that the same rationale it had previously used to permit monopoly pricing by a lawful monopolist would also favor permitting monopsony pricing. The court identified the reasons underlying this principle to include "judicial reluctance to deprive the lawful monopolist . . . of its lawful rewards, and a judicial recognition of the practical difficulties of determining what is a 'reasonable' or 'competitive' price."²²

Clearly the latter point, that it is difficult to distinguish a competitive price from a monopoly price, is equally applicable to distinguishing a competitive price from a monopsony price. On the other hand, there is no reason to believe this task is any harder than distinguishing a competitive price from a predatory price, a job which courts have undertaken despite the acknowledged difficulty.²³

Moreover, it is not inevitable that the ability to monopsony price should be a reward for the legitimate attainment of a monopoly. One could argue that permitting monopoly pricing was reward enough and, as such, there is no legitimate reason to allow a monopsonist to injure its suppliers by forcing their prices below remunerative levels, perhaps even forcing them out of business completely.

Finally, the *Kartell* court failed to discuss another rationale set forth by the court in *Berkey Photo* for permitting monopoly pricing, i.e., that monopoly pricing tends to encourage competitors who will challenge the monopoly. "[A]lthough a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there

¹⁹*Kartell*, 749 F.2d at 929.

²⁰603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Section two of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

²¹*Berkey Photo*, 603 F.2d at 294.

²²*Kartell*, 749 F.2d at 927.

²³*See, e.g., MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can."²⁴ This simply means that a monopolist who prices above the competitive level may sow the seeds of its own destruction.

Monopsony pricing, on the other hand, may enhance the monopolist's market power. If the monopolist can wring concessions from its suppliers that are not available to its competitors, the monopolist may be able to undercut its competitors and eliminate them entirely.

There are many problems with this analysis, however. First, by obtaining concessions not available to its competitors, a monopsonist could violate the Robinson-Patman Act.²⁵ Second, assuming such pricing did enhance the monopolist's market share, it is not clear the supplier would incur an injury against which the antitrust laws would protect.²⁶

The United States Supreme Court denied certiorari in the *Kartell* case.²⁷ Nevertheless, the novel issues raised by that decision may not be fully resolved. It is entirely possible that the Court could be persuaded that monopsony pricing should not be equated with monopoly pricing.

However, this issue was neither central to nor examined in any depth in the *Ball Memorial* opinion. The court concluded, without citation, "Blue Cross/Blue Shield cannot, as a matter of law, monopolize or attempt to monopolize the hospital services industry because Blue Cross/Blue Shield has never and does not now compete in that market."²⁸ Presumably, the court must have concluded that monopsony pricing cannot constitute a violation of section two because a monopsonist does not compete with its suppliers.

The real issue, however, is not whether the monopsonist competes in the market it monopsonizes, but whether monopsony pricing enhances the monopsonist's market share in any market in which it does compete.

The plaintiffs argued that Blue Cross/Blue Shield could enhance its market share by demanding concessions not available to its competitors. The court rejected this argument, concluding, "Blue Cross/Blue Shield cannot coerce unfavorable contract terms, cause cost-shifting or force price discrimination from a preferred hospital. All pricing decisions are within the exclusive business judgment of each hospital."²⁹ Thus, the court apparently concluded that even if the exercise of monopsony power did

²⁴*Berkey Photo*, 603 F.2d at 294.

²⁵15 U.S.C. § 13 (1982). The Robinson-Patman Act prohibits discrimination between purchasers of goods of "like grade and quality." It is a violation of the Robinson-Patman Act for a purchaser to demand and/or receive price concessions not available to its competitors.

²⁶*See Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

²⁷105 S. Ct. 2040 (1985).

²⁸*Ball Memorial*, 603 F. Supp. at 1087.

²⁹*Id.*

violate section two, there was no violation in this case because Blue Cross/Blue Shield did not exercise this power.

However, the court made no factual findings to support this essentially factual conclusion. This conclusion *assumes* Blue Cross/Blue Shield does not possess monopsony power. The court's factual findings support the conclusion that Blue Cross/Blue Shield has no *monopoly* power in the market for health care financing for consumers. However, the factual findings do not address the question whether Blue Cross/Blue Shield had *monopsony* power in the market for purchasing health care services.³⁰

C. Policy Considerations

This litigation also raises interesting policy questions such as whether introducing "competition" to hospitals will cause hospitals to increase their charges. The plaintiffs argued that Blue Cross/Blue Shield's PPO would cause hospitals to charge higher prices to other patients in order to offer lower prices to Blue Cross/Blue Shield patients as a result of Blue Cross/Blue Shield's monopsony power.³¹

Normally, such cost shifting is not possible in a competitive market. Classic economic theory teaches that a profit-maximizing competitor will charge a price fixed by the forces of supply and demand and that competitive forces will prevent it from raising its price above a competitive level.³² Thus, in a competitive market, competitive forces would not allow the hospital to shift the costs by raising prices to others. Rather, the hospital would have to absorb the losses or increase its efficiency.

The flaw in this argument is that it assumes the hospital functions as a profit-maximizing entity. In fact, many hospitals are not-for-profit organizations and thus may not be charging what the market can bear. Therefore, if they are charging below the competitive rate they can increase their charges to non-PPO members and shift costs to these patients. The net result could be that competition, which forces prices to a competitive level, causes an increase, not a decrease, in the cost of medical care.

It is not clear that causing prices to rise to a competitive level poses an antitrust concern because the antitrust laws are generally concerned with schemes which will raise prices above the competitive level, at least eventually.³³ However, it clearly raises a serious public policy concern.

³⁰See *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania*, 574 F. Supp. 457, 469-70 (M.D. Pa. 1983), *aff'd without opinion*, 722 F.2d 733 (3d Cir. 1983).

³¹See, e.g., Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the Complaint at 7-24, *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 603 F. Supp. 1077 (S.D. Ind. 1985), *affirmed*, No. 85-1481 (7th Cir. March 4, 1986).

³²M. SAMUELSON, *ECONOMICS* 39-40, 57-58 (1980).

³³Even where the defendant is charged with pricing below cost, the ultimate competitive concern is that the predator will succeed in driving out its rivals and then raising prices.

If competition causes prices to *rise*, it may be undesirable to force competition upon this industry.

Perhaps a more significant public policy concern is the question of who is to bear the cost of medical care for those who cannot afford it. For years, indigent care has essentially been subsidized by hospitals by shifting the cost of care to patients who can pay. As illustrated above, Blue Cross/Blue Shield may have sufficient market power to force hospitals to shift the cost of subsidization to other patients. Alternatively, the hospital may have to absorb the costs or simply stop providing these services. In any event, this potential cost shifting raises the question of what services will be available to the indigent and from what source such services will be remunerated.

Judge Steckler's decision in *Ball Memorial* makes it unlikely that PPO's in Indiana will be further challenged on antitrust grounds. Thus, to the extent these organizations really act to lower costs to consumers, PPO's can be expected to flourish. The opinion fails to deal with the public policy questions raised by these organizations, such as who, if anyone, is to pay for the care to the indigent, but these questions may well be outside the scope of the judicial branch, in any event.

III. CHALLENGES TO DENIALS OF STAFF PRIVILEGES

While the health care industry has experienced an explosion in antitrust litigation generally, the majority of cases filed involve hospital decisions to deny staff privileges to physicians and other health care providers.³⁴

There can be no question that review of physician performance is desirable and necessary to ensure high quality health care. Nevertheless, attempts to limit staff privileges raise serious anticompetitive problems. Such decisions are usually made with input from, and often at the instance of, the hospital's medical staff.³⁵ Medical staffs may well have anticompetitive reasons to limit access of competing physicians to the hospital.³⁶ Difficult public policy problems are raised by attempts to balance the need for physician review against the potential anticompetitive dangers arising therefrom.

³⁴Undated Press Release by National Health Lawyers Association (available at *Indiana Law Review* Office).

³⁵A hospital's medical staff is a conglomeration of independent competing physicians best viewed for antitrust purposes as a "walking conspiracy." See *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980); *Human Resource Institute of Norfolk, Inc. v. Blue Cross of Virginia*, 498 F. Supp. 63 (E.D. Va. 1980).

³⁶For example, the medical staff may seek to restrict artificially the supply of doctors to increase prices, or it may seek to exclude known price cutters.

The Seventh Circuit recently grappled with this issue in *Marrese v. Interqual, Inc.*³⁷ In that case, Dr. Marrese, a physician, sued Deaconess Hospital in Evansville, Indiana, its board of directors, and various other persons and entities, alleging that the proposed revocation of his hospital staff privileges violated the antitrust laws. The defendants moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the allegedly illegal activities did not have sufficient effect on interstate commerce. The district court agreed and dismissed the complaint. Dr. Marrese appealed to the Seventh Circuit.

The Seventh Circuit held that the lower court erred in dismissing the complaint on jurisdictional grounds, but held that the complaint should nevertheless have been dismissed because the allegedly illegal conduct was exempt under the so-called state action doctrine.³⁸

The state action doctrine was first articulated by the United States Supreme Court in *Parker v. Brown*.³⁹ In that case, the Court held that the federal antitrust laws did not prohibit a state, its officers, or agents from engaging in anticompetitive activities directed by the state legislature.⁴⁰ Thus, this doctrine creates an "exemption" for otherwise illegal conduct carried out by the state. This exemption has subsequently been extended to private parties acting at state direction.⁴¹

To fall within the doctrine, the conduct must meet two tests. First, the challenged restraint must be clearly articulated and affirmatively expressed as state policy. Second, the policy must be actively supervised by the state itself.⁴²

Dr. Marrese's privileges were revoked after a substantial review by both the hospital and the hospital's medical staff. A special committee had been formed, composed of selected members of the medical staff, to audit surgical back procedures performed by Dr. Marrese. The results of the review raised questions regarding the appropriateness of the surgeries performed by Dr. Marrese.⁴³ The committee recommended certain procedures be implemented to monitor surgery performed by Dr. Marrese.⁴⁴

The committee later retained an outside consultant engaged in the business of performing medical audits to audit further Dr. Marrese's surgical procedures.⁴⁵ Based on the findings of the consultant, the com-

³⁷748 F.2d 373 (7th Cir. 1984).

³⁸*Id.* at 374.

³⁹317 U.S. 341 (1943).

⁴⁰*Id.* at 352.

⁴¹*See* Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985).

⁴²*Marrese*, 748 F.2d at 375.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.*

mittee recommended to the Medical Staff Executive Council that Dr. Marrese's privileges be revoked.⁴⁶ The recommendation was adopted by the council, but was stayed pending an evidentiary hearing which was required by the hospital's administrative procedure.⁴⁷

Prior to the hearing, Dr. Marrese filed suit, alleging the attempts to deny him staff privileges constituted a conspiracy in restraint of trade in violation of section one of the Sherman Act and monopolization in violation of section two.⁴⁸

In finding that the defendants' conduct was "state action," the court relied on Indiana Code section 16-10-1-6.5, which provides:

The medical staff of a hospital shall be an organized group which shall be responsible to the governing board for the clinical and scientific work of the hospital, advice regarding professional matters and policies to the governing board, and shall have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients and the preventability of complications and deaths occurring in the hospital.⁴⁹

The court also found:

To implement this review process, the statutory scheme provides that hospitals establish a peer review committee that shall have "the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint."⁵⁰

In fact, the statutory scheme *does not require* hospitals to establish peer review committees.⁵¹ Rather, Indiana Code section 34-4-12.6-1, relied upon by the Seventh Circuit for its conclusion that "the statutory scheme provides that hospitals establish a peer review committee,"⁵² simply sets forth an evidentiary privilege for communications made to such committees. This should be obvious from the language of the statute and its

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* at 377.

⁴⁹IND. CODE § 16-10-1-6.5 (1982).

⁵⁰*Marrese*, 748 F.2d at 388 (quoting IND. CODE § 34-4-12.6-1).

⁵¹However, the Seventh Circuit apparently read the statute to mandate such a committee. *Id.* at 387.

⁵²*Id.* at 388.

presence in Title 34 of the Indiana Code relating to civil procedure rather than in either Title 16, relating to Health and Hospitals, or Title 25, which includes the licensing requirements for physicians.

Thus, the statutory scheme is permissive rather than mandatory. Nevertheless, the court's conclusion that this statutory scheme constituted a clearly articulated state policy may be correct, particularly in light of the Supreme Court's recent decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*. In that case, the Court held that a permissive scheme could meet the clear articulation standard, stating, "The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties."⁵³

Because the statutory scheme clearly contemplates that some review activity would occur, the fact that peer review committees are not mandated is presumably not crucial in determining whether the standard has been met. However, it is not obvious that the statutory scheme was intended to displace competition or to shield anticompetitive activity.

In *Southern Motor Carriers*, the Court concluded that the statutory scheme clearly intended to replace competition with regulation even though it did not expressly set forth what conduct would be permitted.⁵⁴

Thus, in *Quinn v. Kent General Hospital, Inc.*,⁵⁵ the district court of Delaware rejected the state action defense where there was no evidence the statute supposedly conferring immunity was intended to displace competition. That case also involved a denial of hospital staff privileges. The hospital asserted that denial was protected state action because of a Delaware peer review statute.

The district court rejected the Seventh Circuit's reasoning in *Marrese* and found the statute did not confer immunity.

The question confronting the Court is not merely whether Delaware has adopted a clearly articulated policy of promoting the medical peer review process but whether the legislature intended to displace *competition* in the market for hospital facilities. . . . While it is true that the clear articulation test does not require that the legislature "expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects . . ." there is not even a hint in the Delaware statute that the peer review process will be promoted by conferring a monopoly upon those physicians with entrenched positions on hospital staffs. Nor is there any reason why promotion of the peer review process should require any additional restriction of competition.⁵⁶

⁵³105 S. Ct. 1721, 1728 (1985).

⁵⁴*Id.* at 1731.

⁵⁵617 F. Supp. 1226 (D. Del. 1985).

⁵⁶*Id.* at 1238-39. See also *Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hospital, Inc.*, 1985-1 Trade Cas. (CCH) ¶ 66,432 (E.D.N.C. 1985).

Thus, the Seventh Circuit's conclusion in *Marrese* that the statutory scheme satisfied the first prong of the test can be criticized, but the law in this area is sufficiently nebulous so that this result is not clearly wrong.

The Seventh Circuit's conclusion that the state actively supervised this activity, however, seems much less sound. The court based this conclusion on the fact that state law provides for regulation of hospitals and doctors and that the boards that perform this regulatory supervision have access to peer review committee records.⁵⁷ State law, however, does not require these boards to monitor the peer review process, and, because the case came before the court on the allegations of the complaint as a result of a motion to dismiss, there could be no evidence that these boards did in fact monitor these proceedings.

Thus, the Seventh Circuit, in essence, held there was active state supervision because a statutory scheme existed pursuant to which the state *could* supervise these activities if it so chose. This hardly seems consistent with the ordinary meaning of the words "active state supervision."⁵⁸ Moreover, the analysis of two leading antitrust commentators, Phil Areeda and Don Turner, suggests this would not be active state supervision.⁵⁹ While acknowledging that the law is unclear, Areeda and Turner argue that the key question in determining adequate state supervision should be "whether the operative decisions about the challenged conduct are made by public authorities or by the private parties themselves."⁶⁰ Areeda and Turner conclude that "[a]gency inaction is not sufficient to justify immunity. . . ."⁶¹

There can be no question that the Seventh Circuit's decision was motivated, at least in part, by the court's undoubtedly correct assertion that "peer review is essential to the very lifeblood and heartbeat of medical competency and quality medical care in the State of Indiana and throughout the nation,"⁶² and further that

the threat of a federal antitrust lawsuit will compel able and qualified physicians . . . to abdicate their participation in the medical peer review process. The overall effect will be to destroy the intended purpose of medical peer review; to assure Indiana citizens of quality medical care and protect them from incompetent, unqualified medical treatment.⁶³

⁵⁷*Marrese*, 748 F.2d at 389-90.

⁵⁸*See, e.g.,* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

⁵⁹I P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 213b (1978).

⁶⁰*Id.* ¶ 213b at 73.

⁶¹*Id.* ¶ 213f at 78.

⁶²*Marrese*, 748 F.2d at 392.

⁶³*Id.* at 391-92. The court also cited reasons of judicial economy and due process standards in its disposition of Dr. Marrese's antitrust claims. The court stated:

As a matter of judicial economy, the Federal court must not be further burdened by complex antitrust litigation when the alleged illegal conduct is mandated and

While it is easy to agree with the Seventh Circuit that antitrust challenges to the peer review process raise many public policy questions, it is not equally clear that this process is exempt state action. Thus, the Seventh Circuit's reasoning in *Marrese* may be seriously criticized. Nevertheless, the decision should effectively preclude antitrust challenges to the peer review process in Indiana.⁶⁴

In any event, the Seventh Circuit's decision in *Marrese* enables Indiana hospitals to maintain medical staff review committees which may revoke or deny staff privileges to physicians. This may be accomplished even in light of the potential anticompetitive implications such action entails. While further judicial review may find this activity not countenanced under the state action doctrine, it is clear, for the moment, that the Indiana statutory scheme provides an avenue for state supervision sufficient to justify application of the doctrine.

supervised by the state and, furthermore, the plaintiff is afforded the due process safeguards of hearings and state court review. Common sense dictates that a cause of action under the Sherman Act is not created every time a lawyer, accountant, or architect is denied partnership status in a national firm, a business executive is fired or denied a promotion by a national corporation, or a physician, surgeon, or specialist has hospital staff privileges denied or revoked. In the instant case, Dr. Marrese is entitled to challenge the defendants' motives and conduct in a hearing before the Deaconess medical staff, a review hearing before the joint conference committee of the hospital, and finally through proceedings in the Indiana state court system. Just as a disgruntled state bar applicant who is denied admission to a state bar has no cause of action under the Sherman Act against a state mandated and supervised bar review committee. . . .

Id. at 393.

⁶⁴See *Lombardo v. Sisters of Mercy Health Corp.*, 1985-2 Trade Cas. (CCH) ¶ 66,749 (N.D. Ind. 1985); *Ezpeleta v. Sisters of Mercy Health Corp.*, 1985-2 Trade Cas. (CCH) ¶ 66,746 (N.D. Ind. 1985).

Developments in Business Associations Law

PAUL J. GALANTI*

I. MUNICIPAL ANTITRUST LIABILITY

Just as municipalities and local governments were having prospects of liability under federal antitrust law¹ lessened by congressional² and judicial action,³ the Indiana Court of Appeals has decided a case exposing them to liability under the Indiana Antitrust Act.⁴ In *City of Auburn*

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¹The principal federal antitrust statute is the Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1982). It is supplemented by the Clayton Antitrust Act. *Id.* §§ 12-26. *See generally* S. OPPENHEIM, G. WESTON & J. MCCARTHY, *FEDERAL ANTITRUST LAWS* 7-21 (4th ed. 1981); L. SULLIVAN, *ANTITRUST* § 3 (1977).

²The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. 1985), prohibits the recovery of damages, interest, costs, and fees from general or special governmental units which might have violated the antitrust laws. The Act does not immunize the units from antitrust liability because it leaves intact the possibility of injunctive relief. Rather, it removes the incentive of treble damages otherwise available to antitrust plaintiffs. Section 4 of the Clayton Act, *id.* § 15, authorizes the recovery of treble damages, costs, and fees.

³In *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985), the United States Supreme Court held that the defendant city was immune from antitrust liability under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The effect of *Hallie* was to clarify uncertainty about municipal antitrust liability that followed the Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). *Hallie* held that unlike private parties which are entitled to antitrust immunity only if they can demonstrate that the state clearly articulated and affirmatively expressed an anticompetitive policy, *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985), local governments qualify for the *Parker v. Brown* exemption by demonstrating that the state has authorized regulation rather than competition even if it has not compelled such conduct. A general grant of authority to a community such as a typical home rule statute is not sufficient, however, to trigger the exemption. 455 U.S. 40 (1982).

There were more than 250 pending antitrust suits involving local governmental units when *Hallie* was decided. These included *Unity Ventures v. Village of Grayslake and County of Lake*, No. 81C 2745 (N.D. Ill. filed 1981) where a judgment of \$28.5 million was awarded. This judgment would likely bankrupt the municipality. The Local Government Antitrust Act might aid Grayslake because the damage prohibition can be given a retroactive effect under some circumstances. 15 U.S.C. § 35(b) (Supp. 1985).

⁴IND. CODE §§ 24-1-2-1 to -12 (1982). The Indiana Code contains other provisions proscribing anticompetitive conduct. *Id.* §§ 24-1-1-1 to -6; -3-1 to -5; and -4-1 to -4. Although the bulk of antitrust litigation is federal, 16 J. VON KALINOWSKI, *BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION* § 81.01[5] (rev. ed. 1976), state antitrust laws serve a valid supplementary purpose. *See generally* E. KINTNER, *ANTITRUST PRIMER* 159-63 (2d ed. 1973). State antitrust laws are not preempted by the federal antitrust laws. *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910).

v. *Mavis*,⁵ the court affirmed a judgment⁶ for plaintiff Mavis following a Whitley Circuit Court jury trial.

Although there are similarities between the Indiana Antitrust Act and the federal antitrust laws,⁷ there is no federal counterpart to section 24-1-2-3,⁸ which was involved in *Mavis*. Section 24-1-2-3, as it was worded when *Mavis* arose, prohibited schemes or other efforts that "limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work . . ." and combinations or conspiracies that "stifle or restrict free competition for the letting of any contract for private or public work. . . ."⁹

Mavis claimed that Auburn and defendant D & L Communications "contrived" to develop radio communication equipment specifications favoring equipment sold by D & L before ostensibly open and competitive bidding to sell radios to the Auburn fire department.¹⁰ Consequently, Mavis did not have a reasonable chance of selling his equipment,¹¹ and he was injured to the extent of the time lost in preparing a useless bid.¹²

Auburn and D & L did not dispute the judgment that section 24-1-2-3 was violated¹³ but argued that Mavis' expenses were inherent in preparing any competitive bid.¹⁴ The court dismissed this argument by noting that collusion between the government and a favored bidder was just the type of conduct section 24-1-2-3 was intended to prohibit. The

⁵468 N.E.2d 584 (Ind. Ct. App. 1984). Judge Hoffman concurred and filed a separate opinion. *Id.* at 587.

⁶Even though Mavis' damages were trebled under IND. CODE § 24-1-2-7 (1982), his damages of \$1,458 were substantially less than his attorney's fees of \$17,092. 468 N.E.2d at 585. Section 24-1-2-7 is patterned after section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), and authorizes a person injured in business or property by a violation of the Act to bring a civil action seeking treble damages, costs and attorney's fees. The *Mavis* litigation was of long standing. Suit was originally filed in 1974 and resulted in summary judgment for Auburn. This judgment was reversed in 1980. A jury verdict for Mavis was set aside by the trial court. A second verdict for Mavis, which was the subject of the appeal, was entered in March, 1983. 468 N.E.2d at 584 n.1.

⁷See *Sandridge v. Rogers*, 167 F. Supp. 553 (S.D. Ind. 1958); *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129 (Ind. Ct. App. 1980), discussed in Galanti, *Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 31-34 (1982); and *Citizens Nat'l Bank v. First Nat'l Bank*, 165 Ind. App. 116, 331 N.E.2d 471 (1975), discussed in Galanti, *Business Associations, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 57, 58-67 (1976).

⁸IND. CODE § 24-1-2-3 (1982).

⁹*Id.* The provision was amended in 1978 to eliminate verbiage. Acts of 1978, Pub. L. No. 2-1978, § 2404, 1978 Ind. Acts 474.

¹⁰468 N.E.2d at 584.

¹¹*Id.* at 586.

¹²The judgment was three times the value of Mavis' lost time. *Id.* at 584-85.

¹³*Id.* at 586.

¹⁴*Id.*

collusion resulted in the expense of preparing a useless bid, which was what Mavis sought to recover rather than the profits he might have obtained had he secured the bid.¹⁵

The result in *Mavis* is reasonable on its face, but it is possible to wonder why Auburn did not challenge the finding that it had violated section 24-1-2-3. Certainly the provision can apply to a municipality that tampers with the competitive bidding process, but there is nothing in the language mandating its application.¹⁶ Unlike section 24-1-2-1 of the Indiana Antitrust Act,¹⁷ section 24-1-2-3 contains no absolute requirement of concerted action in either its original or amended form. Thus, it is possible to hold a party such as D & L liable, assuming that its conduct impeded the bidding process, while discharging the municipality.

The word "absolute" is used advisedly because of the recent decision in *Tilbury v. City of Fort Wayne*.¹⁸ *Tilbury* affirmed a summary judgment for the defendants in an action alleging Fort Wayne officials violated section 24-1-2-3 by conspiring to deprive the plaintiff of construction contracts for which he was the lowest bidder.¹⁹ The *Tilbury* rationale was that the defendants were officials, or at least quasi-officials, of Fort Wayne and were acting for the city as an entity. Consequently, the city of Fort Wayne could not "scheme, contract or combine with itself. . . ."²⁰ *Tilbury*, therefore, interprets the present version of section 24-1-2-3 as requiring concerted action.²¹ The provision now uses the terms "scheme, contract or combination."²² These terms are also used in section 24-1-2-1 of the Act, which does require concerted action.²³

¹⁵*Id.* at 585-86. The court thus distinguished cases cited by Auburn where plaintiffs were denied relief because they had failed to prove they would have received the bid but for the antitrust violation. See *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975); *Ovitron Corp. v. General Motors Corp.*, 512 F.2d 442 (2d Cir. 1975); *A.J. Goodman & Son, Inc. v. United States Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949); *Urban Prod. Int'l, Ltd. v. National Disposal Serv.*, 32 Ill. App. 3d 299, 336 N.E.2d 138 (1975).

¹⁶Not surprisingly, there is no legislative history on section 23-1-2-3, which was originally enacted in 1907. Acts of 1907, ch. 243, § 3.

¹⁷IND. CODE § 24-1-2-1 (1982). This provision is patterned after section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which requires concerted action.

¹⁸471 N.E.2d 1183 (Ind. Ct. App. 1984).

¹⁹*Id.* at 1184.

²⁰*Id.* at 1186. The Supreme Court recently took a position similar to *Tilbury* when it overruled the long established intra-enterprise conspiracy doctrine propounded in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), and held that a parent corporation could not conspire with its wholly owned subsidiary. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

²¹471 N.E.2d at 1186.

²²IND. CODE § 23-1-2-3 (1982).

²³*Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301 (S.D. Ind. 1977); *Rumple v. Bloomington Hosp.*, 422 N.E.2d 1309 (Ind. Ct. App. 1981).

Of course, statutes are to be construed consistently and harmoniously,²⁴ but when *Mavis* arose, the wording of the two provisions differed sufficiently to support the proposition that section 24-1-2-3 could apply to unilateral as well as concerted conduct distorting the competitive bidding process. Section 24-1-2-3 did use terms such as "understandings," "arrangements," "contracts," "agreements," or "combinations," which connote concerted action, but the statute also referred to "schemes," "designs," and "plans" which could be formulated and carried out by one entity.²⁵ The language was changed in 1978 to parallel section 24-1-2-1, which would seem to indicate a legislative intent to change the scope of section 24-1-2-3. It must be recalled, however, that the purpose of the Act that amended the section²⁶ was to rewrite the criminal sanctions for violating the Act and numerous other Indiana statutes. It is possible the drafters merely intended to eliminate verbiage rather than change the substantive scope of section 24-1-2-3. If so, *Tilbury* might be wrong in narrowly reading section 24-1-2-3. It must be conceded, however, that the present language does tend to connote concerted rather than individual action.

If the *Tilbury* interpretation of section 24-1-2-3 requiring collusion is correct, then the probability of holding a third party such as D & L liable by itself while absolving Auburn is lessened. Otherwise, the result will be something akin to a one person tango. A collusion requirement with respect to public bids would undercut the argument against holding the governmental unit liable for any antitrust violation under section 24-1-2-3.²⁷

Assuming there is merit to reducing municipal antitrust exposure, as seems to be the case on the federal level, the General Assembly might well consider revising section 24-1-2-3 to impose liability only on a third party tampering with a competitive bidding process, at least for public works, but not on the governmental unit itself. Recent federal developments²⁸ bring to question the wisdom of subjecting governmental units to harsh antitrust sanctions. The amounts involved in *Mavis* were small compared to some cases,²⁹ and there is little likelihood that a judgment of less than \$20,000 will bankrupt Auburn. It must be re-

²⁴471 N.E.2d at 1186 (citing *Matter of Lemond*, 274 Ind. 505, 413 N.E.2d 228 (1980), and *Board of Medical Registration & Examination v. Turner*, 241 Ind. 73, 168 N.E.2d 193 (1960)).

²⁵IND. CODE § 24-1-2-3 (1978), amended by Acts of 1978, Pub. L. No. 2, § 2404, 1978 Ind. Acts 474.

²⁶Acts of 1978, Pub. L. No. 2, § 2404, 1978 Acts 474.

²⁷Section 24-1-2-3 also covers letting of contracts for private works.

²⁸See *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Local Government Antitrust Act of 1984*, 15 U.S.C.A. §§ 34-36 (Supp. 1985).

²⁹In *Unity Ventures v. Village of Grayslake*, No. 81 C 2745 (N.D. Ill. filed 1981), a judgment of \$28.5 million was entered against the village and Lake County.

membered, however, that the judgment ultimately will be paid by the taxpayers. The purpose of section 24-1-2-3, and of the entire Antitrust Act, is to prohibit anticompetitive behavior,³⁰ but this objective can be accomplished by making the outside party involved in rigging the bidding process liable.³¹ In fact, sole treble damage liability in a case such as *Mavis* might be a more effective deterrent.

The premise of the Supreme Court's decision in *Parker v. Brown*³² was that Congress did not intend the Sherman Act to displace the field of state economic regulation and that states were free to adopt a system of regulation in lieu of free competition. There are limits to the *Parker v. Brown* exemption,³³ and perhaps the wisdom of permitting states to interfere in economic activities is suspect in this day of deregulation. The rationale, however, is basically a tenet of federalism which might carry over to the relationship between states and local government units. This view does not follow as a matter of course from the recent federal developments, but it is something the General Assembly might wish to consider. The courts may also wish to reconsider the point if section 24-1-2-3 arises again in a suit against an Indiana municipality.³⁴

The *Mavis* opinion does not discuss what was done to influence the specifications for the communications equipment. It is possible, however, that efforts to influence specifications to favor one vendor's products should be immune from antitrust challenge as the natural consequence of the need to purchase specialized rather than fungible equipment. Perhaps the D & L system was the best for the needs of the Auburn fire department, and specifications favoring D & L could have benefited

³⁰Royer v. State *ex rel.* Brown, 63 Ind. App. 123, 112 N.E. 122 (1916).

³¹This argument would not apply to rigging the bidding process for private works, which is also proscribed by section 24-1-2-3. In such cases treble damages against both parties would be appropriate in addition to the relief afforded by section 24-1-2-4. IND. CODE § 24-1-2-4 (1982).

³²317 U.S. 341 (1943).

³³See, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). See generally L. SULLIVAN, ANTITRUST § 238(a)-(b) (1977); Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435 (1981).

³⁴It is unlikely Auburn would be subject to liability if the suit were under the Sherman Antitrust Act because of *Hallie*. In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the court held that a broad grant of home rule authority was not sufficient to protect local governmental action from antitrust scrutiny. The Indiana Code, however, specifically authorizes governmental units to establish, maintain, and operate firefighting and fire prevention systems and specifies that they may provide facilities and equipment for a system. IND. CODE § 36-8-2-3 (1982). This should be a sufficient grant of authority to permit an anticompetitive bidding process if the city so desires. The wisdom of such a process is questionable but, presumably, that is a matter for the electorate. Indiana law generally requires bidding for most public works or public purchases of materials and supplies except where relatively small amounts of money are involved. IND. CODE §§ 5-16-1-1.1 to 2-3, 5-17-1-1 to -5, 36-1-12-1 to -5 (1982).

the city. It would be ironic if Auburn were liable for three times Mavis' expenses plus the cost of buying a superior D & L system. Of course, this argument fails where basically fungible products are involved and specifications precluding competitors would be based on irrelevant considerations.³⁵

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc. (Whitten I)³⁶ held that an effort by a vendor to influence a public body to adopt its specifications for a public pool was outside the scope of *Parker v. Brown*.³⁷ Whitten, however, gave a particularly narrow reading to the *Noerr-Pennington-Trucking Unlimited* doctrine.³⁸ Furthermore, it was only a decision on the defendant's motion for summary judgment, and ultimately the defendant prevailed. It was eventually determined that the defendant's unilateral effort to get the municipality to purchase its product was not an antitrust violation.³⁹ Consequently, D & L's conduct may have been lawful under the Sherman Act, but it must be remembered that there is no federal counterpart to section 24-1-2-3.

In conclusion, *Mavis* cannot be criticized as an implausible reading of section 24-1-2-3 of the Indiana Antitrust Act, particularly as it is now worded. The result of imposing liability on Auburn, however, is open to criticism on policy grounds because the taxpayer of the local governmental unit is the ultimate bearer of the liability. The state should protect the competitive bidding process, but imposing treble damage liability on a vendor who distorts the process, even if the conduct does not violate the Sherman Act,⁴⁰ would satisfy this objective.

³⁵A far-fetched example might be specifications for the purchase of paper clips that called for delivery in yellow boxes where one vendor used yellow boxes and all other vendors used green boxes. This is far-fetched, perhaps, but this is the kind of conduct which has no economic justification.

³⁶424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

³⁷*Id.* at 31.

³⁸See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of America v. Pennington*, 387 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961); see also *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (action by officers of defendant corporation to influence municipality to deny a CATV franchise to plaintiff within doctrine).

³⁹*George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). It has been asserted that the Supreme Court's decision in *Trucking Unlimited*, 404 U.S. 508 (1972), implicitly overruled *Whitten I*. *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980). Some courts, however, have taken the position that the doctrine does not apply where public officials are involved in the conspiracy. *E.g.*, *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281-82 (3d Cir. 1975).

⁴⁰The court of appeals also rejected the city's argument that it should have been permitted to show that other factors led to D & L's getting the contract. 468 N.E.2d at 586. Assuming the position of the court on the liability of Auburn under section 24-1-

II. SALE OF BUSINESS DOCTRINE

Under Indiana law, as is now the case under federal law, a security is a security is a security. With apologies to Gertrude Stein, this comment reflects the impact of *Wisconics Engineering, Inc. v. Fisher*,⁴¹ which dealt with the so-called "sale of business doctrine" under the Indiana Securities Act.⁴² *Wisconics* anticipated the United States Supreme Court decision in *Landreth Timber Co. v. Landreth*,⁴³ which held that the sale of one hundred percent of the shares of a business was the sale of a "security" within the meaning of federal securities law.⁴⁴ The *Landreth* decision resolved a dispute that had generated considerable commentary⁴⁵ and sharply divided the circuit courts.⁴⁶

Wisconics was an interlocutory appeal of a decision of the Huntington Circuit Court granting summary judgment in favor of plaintiff Fisher against *Wisconics Engineering*⁴⁷ and the two principals behind *Wisconics*. *Wisconics Engineering* had purchased one hundred percent of the outstanding shares of Fisher's incorporated business, Fisher Engineering.

2-3 is correct, this holding is correct. If the relationship between D & L and the city in fact was an illegal restraint on the competitive bidding process, the violation occurred before the bidding. Therefore, any factors considered by the city in actually selecting the D & L bid were irrelevant and properly excluded at trial.

⁴¹466 N.E.2d 745 (Ind. Ct. App. 1984).

⁴²IND. CODE §§ 23-2-1-1 to -24 (1982).

⁴³105 S. Ct. 2297 (1985). See also *Gould v. Ruefenacht*, 105 S. Ct. 2308 (1985), decided as a companion case to *Landreth*.

⁴⁴The two primary federal securities acts are the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), and the Securities Exchange Act of 1934, *id.* §§ 78a-78jj (1982).

⁴⁵The *Wisconics* court cited only a few of the articles and comments written on the subject. 466 N.E.2d at 761. See Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 CASE W. RES. 367 (1967); Rapp, *Federal Securities Laws Should Protect Some Purchasers of All or Substantially All of a Corporation's Stock*, 32 CASE W. RES. 595 (1982); Selden, *When Stock is Not a Security: The "Sale of Business" Doctrine Under the Federal Securities Laws*, 37 BUS. LAW 637 (1982); Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock is not a Federal Security Transaction*, 57 N.Y.U.L. REV. 225 (1982).

⁴⁶The circuit courts that had adopted the sale of business doctrine included the Seventh, *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (1981); *Fredericksen v. Poloway*, 637 F.2d 1147, *cert. denied*, 451 U.S. 1017 (1981); the Ninth, *Landreth Timber Co. v. Landreth*, 731 F.2d 1348 (1984), *rev'd*, 105 S. Ct. 2297 (1985); the Tenth, *Chandler v. K., Inc.*, 691 F.2d 443 (1977); and the Eleventh, *King v. Winkler*, 673 F.2d 342 (1982).

The circuit courts that had rejected the doctrine included the Second, *Golden v. Garafalo*, 678 F.2d 1139 (1982); the Third, *Gould v. Ruefenacht*, 737 F.2d 320 (1984), *aff'd*, 105 S. Ct. 2308 (1985); the Fourth, *Coffen v. Polishing Machines, Inc.*, 596 F.2d 1202, *cert. denied*, 444 U.S. 868 (1979); the Fifth, *Dailey v. Morgan*, 701 F.2d 496 (1983); and the Eighth, *Cole v. PPG Indus., Inc.*, 680 F.2d 549 (1982).

⁴⁷*Wisconics* was a Delaware corporation owned equally by the individual defendants. It had been formed solely for the purpose of acquiring and holding all Fisher Engineering shares. 466 N.E.2d at 748.

The individual defendants had guaranteed the promissory note that was the subject of the litigation. The note represented a substantial portion of the purchase price. The court of appeals reversed the judgment for Fisher and remanded.⁴⁸

The business was not as successful as defendants Fitzpatrick and Zenner had anticipated,⁴⁹ and eventually Wisconics defaulted on the note.⁵⁰ The defendants maintained that Wisconics' problems were the result of Fisher's fraudulent misrepresentations, while Fisher contended the defendants had looted the corporation and misappropriated assets to themselves.⁵¹

The trial court granted Fisher's second motion for summary judgment.⁵² It found, in essence, that the defendants had approached Fisher to buy his business and had been furnished audited corporate financial statements for five years and, more importantly, possessed the business experience to understand the statements.⁵³ The trial court also concluded that the sale of Fisher Engineering did not involve a sale of a security under the "economic reality test" because the defendants had purchased one hundred percent of the shares and no profits or losses could be derived from the entrepreneurial or managerial efforts of anyone other than themselves.⁵⁴

The defendants raised six issues on appeal,⁵⁵ but only two of these are pertinent to this review.⁵⁶ The first of these was whether the trial court erred in determining that the defendants had not set forth specific facts supporting their affirmative defense of common law fraud sufficient to preclude summary judgment.⁵⁷ The defendants, who had the burden

⁴⁸*Id.* The court affirmed insofar as the trial court ruled against defendants on their common law fraud defense. *Id.*

⁴⁹*Id.* at 749 n.3.

⁵⁰*Id.* at 750. The note contained an acceleration clause, and all principal and interest became due on default. *Id.* at 749.

⁵¹*Id.* at 749. The shares had been pledged as security on the note. Fisher elected to vote the shares and regained control of Fisher Engineering. *Id.* at 750. Eventually, the corporation was placed in a bankruptcy reorganization proceeding operated under Fisher's control. *Id.*

⁵²*Id.* at 750. The second motion for summary judgment appeared to have been more narrowly focused than the first motion. *Id.*

⁵³*Id.* at 750-51.

⁵⁴*Id.* at 751.

⁵⁵*Id.* at 748.

⁵⁶The court rejected four procedural arguments raised by defendants concerning the granting of summary judgment. *Id.* at 751-54. Various arguments were also raised on appeal pertaining to the secured transaction provisions of the Indiana Uniform Commercial Code. IND. CODE §§ 26-1-9-101 to -507 (1982). An impairment of collateral under IND. CODE § 26-1-3-606 was also alleged. The *Wisconics* court concluded that there were issues of fact that had to be resolved with respect to these defenses. 466 N.E.2d at 762-67.

⁵⁷466 N.E.2d at 754-55.

of establishing their affirmative defense,⁵⁸ were disadvantaged because their defense consisted of indefinite, imprecise, and general statements about Fisher's representations rather than specific facts which would show a genuine material issue. Regardless of whether the inadequacies of the defendants' affidavits were inadvertent or whether they could not be any more specific under the circumstances, there does not appear to be much doubt that Fisher's alleged representations fell short of actionable common law fraud.⁵⁹ In fact, the defendants probably could not have been more specific because they had been given ample opportunity to examine the books, records, and other information on Fisher Engineering.⁶⁰

A particularly interesting aspect of the court's discussion of the fraud issue was its reference to an investment letter signed by the defendants.⁶¹ Some may consider investment letters to be mere technicalities required by the Indiana Securities Act to eliminate the need to register securities before sale. The court, however, gave the investment letter in this case great weight and determined that the letter's representations and statements demonstrated an economic and financial sophistication that would make their claim of reliance on vague general representations by Fisher "inconceivable."⁶² *Wisconics* would seem to make it more difficult to allege common law fraud in a securities case where the purchasers have signed an investment letter.

The court of appeals also concluded the defendants' affidavit was inadequate because Fisher's representations were either statements of opinion rather than facts, or were factual representations pertaining to future events.⁶³ As a general proposition, neither expressions of opinion nor statements as to future expectations are grounds for fraud.⁶⁴ This is particularly so where, as here, sophisticated businessmen had the opportunity to scrutinize what they were buying.⁶⁵

The second pertinent issue raised on appeal by the defendants was the trial court's finding that the sale of Fisher Engineering did not involve a sale of a security. By rejecting the "sale of business" doctrine

⁵⁸*Id.* at 755. The court relied on *Johnson v. Padilla*, 433 N.E.2d 393 (Ind. Ct. App. 1982), and *Costello v. Mutual Hosp. Ins., Inc.*, 441 N.E.2d 506 (Ind. Ct. App. 1982).

⁵⁹*Id.* at 755-59.

⁶⁰*Id.* at 757.

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.* at 756, 758-59.

⁶⁴See *Automobile Underwriters v. Rich*, 222 Ind. 384, 53 N.E.2d 775 (1944); *Balue v. Taylor*, 136 Ind. 368, 36 N.E. 269 (1893); *Harness v. Horne*, 20 Ind. App. 134, 50 N.E. 395 (1898).

⁶⁵*Wisconics*, 466 N.E.2d at 758. The court pointed out that ordinary prudence and diligence would make Fitzpatrick and Zenner request specific data supporting any representations of profitability. *Id.* at 757-58.

and accepting that the word "security" as used in section 23-2-1-1(k) of the Indiana Securities Act⁶⁶ means "stock," whether it is one share of many sold for investment purposes or all shares sold to shift control of a business, the *Wisconics* court subjected Fisher to possible liability under section 23-2-1-12 of the Indiana Securities Act,⁶⁷ the antifraud provision of the Act.

Section 23-2-1-12 makes the seller of securities liable for fraudulent acts, for untrue statements of material facts, or for misleading omissions of material facts.⁶⁸ The central consideration in determining the materiality of an omission is whether a reasonable investor would attach importance to the information when making an investment decision.⁶⁹ Section 23-2-1-12 liability differs from common law fraud in that reliance by the purchaser is not required.⁷⁰ There is no assurance that the defendants will prevail in *Wisconics* on remand, but some of Fisher's alleged misrepresentations or omissions might be sufficient to establish a defense to Fisher's suit on the note⁷¹ even though his statements were insufficient to establish a common law fraud defense.

The major portion of the court's discussion on the application of the Indiana Securities Act to the transaction was on the so-called economic reality test utilized by the Seventh Circuit in *Canfield v. Rapp & Son, Inc.*⁷² In *Canfield*, the court held that words in the definition section of the Securities Exchange Act of 1934⁷³ were not to be given their literal meaning and that a share of "stock" was a security for federal securities law purposes only if it: (1) represented an investment in a common venture, and (2) was premised upon a reasonable expectation of profits, (3) to be derived from the entrepreneurial or managerial efforts of others.⁷⁴ Under this rationale, the sale of a going concern that just

⁶⁶IND. CODE § 23-2-1-1(k) (1982). As the *Wisconics* court noted, relying on *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979), securities fraud is broader in scope than common law fraud. 466 N.E.2d at 759 n.8.

⁶⁷IND. CODE § 23-2-1-12 (1982).

⁶⁸The provision is patterned after section 101 of the Uniform Securities Act, UNIF. SEC. ACT § 101, 7A U.L.A. 568 (Master ed. 1978), which in turn is patterned after SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1982).

⁶⁹*Arnold*, 398 N.E.2d at 433. See generally Galanti, *Business Associations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 91 (1981).

⁷⁰*Arnold*, 398 N.E.2d at 435-36.

⁷¹466 N.E.2d at 759-60.

⁷²654 F.2d 459 (7th Cir. 1981), discussed in Galanti, *Business Associations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 41-46 (1983) [hereinafter cited as *1982 Survey*].

⁷³15 U.S.C. § 78c(a)(10) (1982). *Canfield* also alleged a violation of the Securities Act of 1933, *id.* § 77q(a). The definition of security in the 1933 Act is substantially the same as the definition in the 1934 Act and they are considered functional equivalents. *Canfield*, 654 F.2d at 463 n.5.

⁷⁴654 F.2d at 463. The *Canfield* court, as well as the other courts that had adopted

happens to be structured as a stock transfer is not subject to federal antifraud rules because the essence of the transaction is the transfer of the business to which the "stock sale" was a mere incident.

As noted above, the circuits were split on the sale of business doctrine, and some courts specifically rejected a narrow reading of security.⁷⁵ In *Golden v. Garafalo*⁷⁶ and *Gould v. Ruefenacht*,⁷⁷ the courts reasoned that the economic reality test was appropriate where an "unusual or unique" instrument was involved but not when the instrument was labeled "stock" and possessed all the characteristics typically associated with stock.⁷⁸ It was this reading of the definition of security that prevailed in the Supreme Court.⁷⁹

The Seventh Circuit is now bound to follow *Wisconics* in applying Indiana law in diversity or pendent jurisdiction cases under the *Erie* doctrine⁸⁰ and *Landreth* and *Gould* in applying federal law. This is worth noting because, in *Canfield*, the Seventh Circuit also applied its narrow definition of security under federal securities law to the Indiana Securities Act.⁸¹

The *Wisconics* court, in rejecting the sale of business doctrine,⁸² found support for its position in *B & T Distributors, Inc. v. Riehle*.⁸³ The court of appeals in *Riehle*⁸⁴ had concluded section 23-2-1-12 applied to the sale of a business⁸⁵ and this aspect of the case was affirmed by the Indiana Supreme Court.⁸⁶ Although *Riehle* is not the clearest decision and was subsequently reversed, it did apply the antifraud provision to the sale of a business. This was an implicit recognition that the transaction was a sale of securities within the meaning of section 23-2-1-1(k). However, the sale of business doctrine was not directly considered in the case.

No one can seriously argue that the narrow view of decisions like *Canfield* is implausible. Nor can it be seriously denied that it may be

the sale of business doctrine, relied on *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), although the instrument involved in *Forman* labeled "stock" really represented only an interest in a cooperative apartment.

⁷⁵See *supra* note 46.

⁷⁶678 F.2d 1139 (2d Cir. 1982).

⁷⁷737 F.2d 320 (3d Cir. 1984), *aff'd*, 105 S. Ct. 2308 (1985).

⁷⁸*Golden*, 678 F.2d at 1143.

⁷⁹*Landreth*, 105 S. Ct. at 2302. See generally Galanti, 1982 Survey, *supra* note 72, at 43-44.

⁸⁰*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁸¹*Canfield*, 654 F.2d at 463 n.5.

⁸²466 N.E.2d at 761.

⁸³266 Ind. 646, 366 N.E.2d 178 (1977).

⁸⁴359 N.E.2d 622 (Ind. Ct. App. 1977), *rev'd on other grounds*, 266 Ind. 646, 366 N.E.2d 178 (1977).

⁸⁵359 N.E.2d at 624-25.

⁸⁶266 Ind. 646, 647, 366 N.E.2d 178, 179 (1977).

inappropriate to subject a sale of an entire business to attack under federal or state securities laws simply because it is structured as a stock transfer where a similar but differently structured transaction can be attacked only on common law fraud grounds. As the *Wisconics* court rightly noted,⁸⁷ however, this really is a matter for legislative determination.⁸⁸

III. SECURITIES FRAUD

Another interesting case involving the Indiana Securities Act decided during the survey period was *Crook v. Shearson Loeb Rhoades, Inc.*⁸⁹ Crook sued Shearson,⁹⁰ alleging that actions of two Shearson brokers violated the antifraud provisions of the federal Commodity Exchange Act⁹¹ and the Indiana Securities Act⁹² and constituted common law fraud.⁹³ Shearson counterclaimed for a debit balance in Crook's account.⁹⁴

Crook apparently did not appreciate the risk involved in trading commodity futures. He made a profit on some trades, but overall he suffered substantial investment losses.⁹⁵ Eventually, Shearson liquidated his account, but there was a large debit balance even after taking funds from a money market account.⁹⁶

It also appears that the two brokers might have overreached because there was no evidence that Crook had given them discretionary authority to trade his account.⁹⁷ Furthermore, they neither followed Shearson procedures relating to new commodity trading accounts nor determined if speculative investments were appropriate for Crook.⁹⁸

The court concluded that Crook did not understand the concept of "margin" and its significance in commodity trading.⁹⁹ He apparently

⁸⁷466 N.E.2d at 762.

⁸⁸Defendants were not satisfied with a substantial reduction in attorney's fees awarded to Fisher. *Id.* at 767-68. The court of appeals concluded they were challenging the decision to award fees rather than the reasonableness of the fees. Defendants were successful to the extent that the award could be predicated only upon a favorable judgment on the promissory note and the decision on the note was reversed. *Id.* at 768. This is clearly right, but it is certainly reasonable to anticipate that fees would be imposed on defendants if Fisher should happen to prevail at the trial.

⁸⁹591 F. Supp. 40 (N.D. Ind. 1983).

⁹⁰Now known as Shearson/American Express, Inc. *Id.* at 42.

⁹¹7 U.S.C. § 6(b) (1976).

⁹²IND. CODE §§ 23-2-1-12, -19 (1982).

⁹³591 F. Supp. at 42.

⁹⁴*Id.*

⁹⁵*Id.* at 47.

⁹⁶*Id.* Crook apparently hoped that the market would rally to cover his losses and a bad check he had given Shearson. *Id.*

⁹⁷*Id.* at 43.

⁹⁸*Id.* at 44.

⁹⁹*Id.* at 43.

had signed a Shearson Commodity Customer Agreement but had not received a Risk Disclosure Statement that should have been attached to the agreement.¹⁰⁰ More significantly, the court concluded that even if he had received this statement, the true risks involved would not have been fully explained.¹⁰¹

Obviously, Crook was not an appropriate investor to be engaged in commodity trading. He understood that substantial profits could be made in a short time by such investing, but he did not understand that the *quid pro quo* for these possible riches was the possibility of substantial losses. Nor did he understand the steps or procedures that could limit losses in such trading.¹⁰²

The *Crook* decision should give persons in the securities industry some concern because now the broker operates at his peril if he merely gives documents explaining investment risks. It will take a clear record of explanation as to what is involved to preclude the unsuccessful investor from claiming he or she has not been apprised of the risks. This might not be a significant problem with the typical person investing in stocks, but it could be with an unsophisticated, speculative investor in options or futures.¹⁰³

The complaint in *Crook* alleged a violation of section 6b(A)¹⁰⁴ of the Commodity Exchange Act. This provision is similar to section 10(b) of the Securities Exchange Act of 1934,¹⁰⁵ and there is an implied right of action under section 6b¹⁰⁶ just as there is under section 10(b). It is well settled that negligent conduct is not enough to establish liability under section 10(b) and Rule 10b-5, and a plaintiff must show scienter to prevail.¹⁰⁷ However, the negligence-scienter issue has not been settled under the Commodity Exchange Act.¹⁰⁸ The *Crook* court concluded it

¹⁰⁰*Id.* at 43-44.

¹⁰¹*Id.* at 44.

¹⁰²*Id.* at 48.

¹⁰³At a minimum, *Crook* warns brokerage firms to examine commodity customer agreements to determine if there has been a change in the customer's status. The court noted that a new account agreement was executed by the plaintiff in January, 1980, and that a commodity customer agreement received in July, 1980, indicated "a change in occupation and title." It concluded that "an occupational change could signal a change in the financial condition of a customer about which a broker should inquire." 591 F. Supp. at 44.

¹⁰⁴7 U.S.C. § 6b(A) (1982).

¹⁰⁵15 U.S.C. § 78j(b) (1982).

¹⁰⁶*Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982).

¹⁰⁷*Aaron v. SEC*, 446 U.S. 680 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

¹⁰⁸The Commodity Futures Trading Commission has concluded negligence can support liability under section 6b(A). *Gordon v. Shearson Hayden Stone, Inc.*, COMM. FUT. L. REP. (CCH) ¶ 21,016 (1980). This position has been rejected by some courts. *First Commodity Corp. v. CFTC*, 676 F.2d 1, 4 (1st Cir. 1982). Another court views the scienter question

did not have to decide the issue because the brokers had acted recklessly,¹⁰⁹ and recklessness has satisfied the scienter requirement in cases brought under both the Securities Exchange Act¹¹⁰ and the Commodity Exchange Act.¹¹¹

The most intriguing aspect of *Crook* for purposes of this review is the discussion of the Indiana Securities Act. The court quoted section 23-2-1-12,¹¹² which prohibits fraudulent practices in connection with the offer, sale, or purchase of a security. The court then stated that "I.C. 23-2-1-19 provides for the recovery of damages if a violation is proven."¹¹³ Section 23-2-1-12 is similar to section 101 of the Uniform Securities Act,¹¹⁴ and although the language of these provisions is similar to the language of section 10(b), it has been held that the standard of liability is negligence rather than scienter.¹¹⁵ Because the evidence established the scienter necessary, or perhaps necessary, for a violation of section 6b(A) of the Commodity Exchange Act, the negligence standard of section 23-2-1-12 was clearly satisfied.¹¹⁶

There is only one problem with the court's discussion of the Indiana Securities Act. Section 23-2-1-19¹¹⁷ is patterned after section 410(a) of the Uniform Securities Act,¹¹⁸ which provides for damages if a violation is established and the investor no longer owns the security.¹¹⁹ Unfortunately, section 23-2-1-19(a) was amended in 1975 to eliminate the language referring to damages if the securities are no longer owned by the investor, which appears to leave rescission as the only authorized remedy for an injured purchaser.¹²⁰ Unlike section

as unsettled. *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204, 1207 (9th Cir. 1982).

¹⁰⁹591 F. Supp. at 48. Scienter would seem necessary for a violation of section 6b(A) because the provision makes unlawful actions that "cheat or defraud or attempt to cheat or defraud." This is much stronger language than found in section 10(b) of the 1934 Act and implementing rule 10b-5. 17 C.F.R. § 240.10b-5 (1982).

¹¹⁰*E.g.*, *Sanders v. John Nuveen & Co.*, 554 F.2d 790 (7th Cir. 1977); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

¹¹¹*See Kotz*, 685 F.2d at 1207; *First Commodity Corp.*, 676 F.2d at 4.

¹¹²IND. CODE § 23-2-1-12 (1982).

¹¹³591 F. Supp. at 49.

¹¹⁴UNIF. SEC. ACT. § 101, 7A U.L.A. 568 (Master ed. 1978).

¹¹⁵*Rousseff v. Dean Witter & Co., Inc.*, 453 F. Supp. 774 (N.D. Ind. 1978). *See also* *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983); *Bradley v. Hullander*, 272 S.C. 6, 249 S.E.2d 86 (1978); *State v. Temby*, 108 Wis. App. 521, 322 N.W.2d 528 (1982).

¹¹⁶591 F. Supp. at 49.

¹¹⁷IND. CODE § 23-1-2-19 (1982).

¹¹⁸UNIF. SEC. ACT § 410, 7A U.L.A. 670 (Master ed. 1978).

¹¹⁹Section 23-2-1-19 provided for damages when *Rousseff*, relied on by the *Crook* court, arose. *Rousseff*, 453 F. Supp. at 778.

¹²⁰Act of April 30, 1975, Pub. L. No. 265-1975, § 15, 1975 Acts 1402, 1444 (amending IND. CODE § 23-2-1-19 (1972)). The primary purpose for amending § 23-2-1-19 was to

410,¹²¹ nothing in section 23-2-1-19 authorizes a damage action for transactions after 1975. Certainly it cannot be argued that the Indiana General Assembly *impliedly* created a cause of action where securities are no longer owned by repealing statutory language *expressly* creating a cause of action. The current language of section 23-2-1-19 appears to have escaped the notice of the parties and the court, or perhaps it was simply ignored. Because Crook had been closed out of his position in 1980, he no longer owned any security.¹²²

The court also discussed Crook's allegation that Shearson's liability could be based on common law fraud.¹²³ It concluded there was a fiduciary relationship between Crook and the Shearson brokers who exercised *de facto* control over his account and that the elements of common law fraud under Indiana law were satisfied.¹²⁴ The court found that the brokers failed to disclose all material facts and did not adequately explain the material facts that were disclosed.¹²⁵

Although awarding damages under section 23-2-1-19 might be questionable, the Commodity Exchange Act violation and common law fraud justified compensatory damages.¹²⁶ Crook did not get all he wanted because the court rejected his claim for punitive damages.¹²⁷ Shearson may have acted recklessly, but it did not do so knowingly or deliberately.¹²⁸ Punitive damages to deter future misconduct were considered inappropriate because Shearson had procedures and policies designed to protect unsophisticated investors such as Crook and it only had to follow them.¹²⁹ Of course, if there are procedures that have been ignored, punitive damages might be appropriate to ensure that brokerage firms will keep a tighter rein on brokers. However, if the court is right in insisting that the terms of agreements such as the Shearson Commodity Customer Agreements have to be explained to and completely understood by customers under penalty of punitive damages, the potential liability

give a cause of action to sellers as well as purchasers of securities. *See generally* Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975).

¹²¹Damages are available for violations of § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77(l)(2) (1982), from which § 410 was derived.

¹²²591 F.Supp. at 47.

¹²³*Id.* at 49-50.

¹²⁴*Id.* *See* Hall-Hottel Co. v. Oxford Square Co-op, Inc., 446 N.E.2d 25 (Ind. Ct. App. 1983); Peoples Trust Bank v. Braun, 443 N.E.2d 875 (Ind. Ct. App. 1983); Plymale v. Upright, 419 N.E.2d 756 (Ind. Ct. App. 1981); Fleetwood Corp. v. Mirich, 404 N.E.2d 38 (Ind. Ct. App. 1980).

¹²⁵591 F. Supp. at 50.

¹²⁶*Id.* at 50-52. The court did not fix the precise amount of recovery because it was not aware of the appropriate interest rate. *Id.* at 51-52.

¹²⁷*Id.* at 50-51.

¹²⁸*Id.* at 51.

¹²⁹*Id.*

of brokerage firms would be draconian. Compensatory damages plus interest probably is appropriate relief for investors like Crook.¹³⁰

IV. CLOSELY HELD CORPORATIONS, FIDUCIARY DUTIES, AND DERIVATIVE SUITS

One case decided during the survey period demonstrates the problems that can flow from a casually run family business. It also decided several issues pertaining to shareholder derivative actions which had not been resolved previously by Indiana courts. Consequently, the decision in *Dotlich v. Dotlich*¹³¹ is worth noting by Indiana attorneys representing closely held corporations. In *Dotlich*, the court of appeals affirmed in substantial part a judgment of the Johnson Circuit Court against two directors of a closely held corporation.¹³²

The action by Sam Dotlich, one of four brothers, against two of his brothers alleged fraud and breach of their fiduciary duties as directors of a family corporation in which the four brothers were directors and equal shareholders. The dispute was over ownership of various parcels of real estate. The trial court imposed a constructive trust on property held by defendant Monnie Dotlich, ordering him to convey it to the corporation. Monnie was also assessed compensatory and, with his brother Mechel, punitive damages as well as attorney's fees and costs. The trial court also appointed a receiver to take over the business of the corporation. Sam, Mechel, and the fourth brother, Merko Dotlich, were ordered to reimburse the corporation for the value of their homes which had been built with corporate funds. The court of appeals affirmed the judgment except for the attorney fee award and the assessing of punitive damages against Mechel Dotlich.¹³³

The corporation was a successor to a partnership of the four brothers. Real estate purchased by the partnership with partnership funds had been titled in Monnie's name.¹³⁴ Even after the two family corporations

¹³⁰The court awarded Crook reasonable attorney's fees, except for expenses and attorney's fees for a deposition which had to be cancelled because of inclement weather. *Id.* at 52. Crook's conduct barred full recovery from Shearson even though Shearson had failed to follow its own policies to prevent investors such as Crook from engaging in commodities trading. Once Crook began "using" Shearson, hoping the market would rally, he became the guilty party, justifying an award to Shearson on its counterclaim. *Id.*

¹³¹475 N.E.2d 331 (Ind. Ct. App. 1985).

¹³²*Id.* at 350-51.

¹³³Defendant Monnie Dotlich counterclaimed for an accounting. The counterclaim was severed from the derivative action and was pending at the time of the *Dotlich* decision. *Id.* at 337-38.

¹³⁴It is interesting to speculate whether the problems that beset the Dotlich brothers could have been avoided if the title to the real estate had been taken in the name of the partnership as clearly permitted by § 23-4-1-8(3) of the Indiana Uniform Partnership Act.

were formed,¹³⁵ title to property purchased with corporate funds, except for the residences,¹³⁶ was put in Monnie's name alone.¹³⁷ Monnie claimed ownership in the six parcels of real estate titled in his name. Mechel sided with Monnie on this issue and claimed absolute ownership of his home. Sam and Merko contended the corporation beneficially owned all nine parcels.¹³⁸ Sam did not discover the property title situation until 1976.¹³⁹ He attempted to have the corporation remedy the title irregularities for all nine parcels, but he was not successful.¹⁴⁰ It was clear at this point that Monnie was claiming all property in his name.¹⁴¹ Sam's suit charged Monnie and Mechel with breaching their fiduciary duty to the corporation by converting corporate opportunities to their own benefit. Monnie was accused of mismanaging corporate affairs, and Mechel was accused of aiding and abetting.¹⁴²

Several issues were raised on appeal,¹⁴³ most of which related to business associations law.¹⁴⁴ The first issue was whether Sam could be an adequate representative for the corporation in maintaining a derivative action as required by Indiana Trial Rule 23.1.¹⁴⁵ The defendants argued that Sam was disqualified because his home was constructed with corporate funds on property purchased with corporate funds and so engaged

IND. CODE § 23-4-1-8(3) (1982). See generally J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 38 (1968).

¹³⁵Only one of the corporations was involved in the litigation. 475 N.E.2d at 336.

¹³⁶*Id.* The homes of three of the brothers, including the plaintiff's, were purchased and maintained by the corporation although titled in the names of the individuals.

¹³⁷*Id.*

¹³⁸*Id.* at 337.

¹³⁹*Id.*

¹⁴⁰Before Sam filed the shareholder derivative action he introduced a resolution at a meeting of the directors to have all corporate property titled in the corporate name. This motion failed to pass when the two defendant directors voted against it. *Id.*

¹⁴¹*Id.*

¹⁴²The fourth brother, Merko, was brought in as a necessary party to the action. *Id.* The suit sought to have the property conveyed to the corporation and to assess punitive damages against the defendants. It also requested a court-appointed receiver for the corporation.

The trial court entered a judgment in favor of the corporation, imposing a constructive trust on Monnie and compelling him to transfer title to the corporation. The three homes were found to be corporate property and the three brothers were ordered to pay the corporation the value of their respective residences. This issue was deemed to have been tried by the implied consent of the parties. *Id.* at 349-50. Punitive damages, attorney's fees, and expenses were assessed against Monnie and Mechel in favor of the corporation. *Id.* at 337-38.

¹⁴³475 N.E.2d at 338.

¹⁴⁴The defendants also raised statute of frauds and statute of limitation issues. 475 N.E.2d at 340-42.

¹⁴⁵IND. R. TR. P. 23.1. The rule bars a derivative action if it appears that the plaintiff does not fairly and adequately represent the interest of shareholders in enforcing the right of the corporation.

in the same misconduct charged against them.¹⁴⁶ The *Dotlich* court recognized that where all shareholders participate in a wrongful act, no shareholder would be able to bring a derivative suit,¹⁴⁷ and even the corporation would be barred from suing.¹⁴⁸ It rejected this argument under the circumstances because Sam recognized the corporation beneficially owned his residence, while the defendants were resisting the corporation's claim.¹⁴⁹

Mechel further argued that Sam was both plaintiff and defendant in suing derivatively. This argument was properly rejected even though there is no Indiana authority directly on point.¹⁵⁰ The flaw in Mechel's argument was that it ignored the fundamental premise that a derivative action is an indirect effort to enforce the rights of the corporation and not an effort to pursue rights personal to the shareholder.¹⁵¹

He also argued that a director should not be able to bring a derivative action.¹⁵² The court, relying on the New York case of *Tenney v. Rosenthal*,¹⁵³ held that a shareholder who is a director is not barred from suing derivatively because the right to sue facilitates performance of a director's stewardship obligation.¹⁵⁴ *Tenney* involved a statute authorizing a director to sue derivatively, but *Dotlich* used this policy ground to justify applying the rationale to all derivative suits.¹⁵⁵ This result is clearly correct. To rule otherwise would mean that a minority director wishing to protect the interests of a corporation would be precluded from doing so. He would be unable to get the board of directors to act, and would be unable to sue as a shareholder because he was on the board. This

¹⁴⁶475 N.E.2d at 339.

¹⁴⁷*Id.*

¹⁴⁸See *Ross v. Tavel*, 418 N.E.2d 297 (Ind. Ct. App. 1981). See generally 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5972 (Callaghan 1984). It is even possible for the sins of a shareholder to live beyond his ownership. For example, in *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 (1974), and *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N.W. 1024 (1903), the corporations were unable to bring an action in their own names where the present owners were unable to bring derivative suits because they were not contemporaneous owners. This presents the ironic situation of not being able to do something directly because the same action could not be done indirectly.

¹⁴⁹475 N.E.2d at 339. There is nothing unusual in the resolution of this issue and, in fact, it is consistent with *Gabhart v. Gabhart*, 267 Ind. 370, 370 N.E.2d 345 (1977).

¹⁵⁰The *Dotlich* court relied on 13 W. FLETCHER, *supra* note 148, at § 5947.

¹⁵¹In unusual cases, it is possible that relief in a derivative action may run in favor of minority shareholders rather than the corporation. *E.g.*, *Perlman v. Feldman*, 219 F.2d 173 (2d Cir. 1955), *cert. denied*, 349 U.S. 952 (1954).

¹⁵²475 N.E.2d at 339.

¹⁵³6 N.Y.2d 204, 189 N.Y.S.2d 158, 160 N.E.2d 463 (1959).

¹⁵⁴475 N.E.2d at 339.

¹⁵⁵The same rationale has been used to permit minority trustees to sue majority trustees on behalf of a charitable corporation. *Holt v. College of Osteopathic Physicians*, 61 Cal. 2d 250, 40 Cal. Rptr. 244, 394 P.2d 932 (1964).

“Catch-22” situation could eliminate the derivative action in the context of closely held corporations.

Both defendants also argued that Sam had not alleged the particular efforts to obtain the requested relief as required by Rule 23.1. They contended that the demand required by the rule must be explicit.¹⁵⁶ The court recognized that under certain circumstances the demand requirement is excused.¹⁵⁷ The demand was not excused in *Dotlich*, but Sam’s resolution attempting to have all parcels titled in the corporate name was sufficient because the board of directors had had the opportunity to remedy the complaint and avoid litigation.¹⁵⁸ The failure to pass the resolution was a rejection of “nonjudicial efforts to obtain the relief requested in the derivative complaint.”¹⁵⁹

One aspect of the defendants’ statute of limitations argument should be noted. They argued that Sam’s lack of knowledge of Monnie’s claim did not constitute the active concealment needed to toll the running of the statute.¹⁶⁰ The court recognized, relying on *Forth v. Forth*,¹⁶¹ that concealing a cause of action entails some kind of “trick” or contrivance. It concluded, however, that Monnie’s fiduciary duty to the corporation and the other shareholder-directors obviated the need for active and intentional concealment.¹⁶² His failure to disclose his intentions concerning the property tolled the statute and all actions were timely.¹⁶³ This is one more indication of the willingness of Indiana courts to hold principals in closely held corporations to a rather high standard of loyalty.¹⁶⁴

Dotlich also refined the concept of corporate opportunity under Indiana law. The court emphasized that Monnie had the burden of proving he had not violated his fiduciary duty. The law presumes fraud when it is shown that a fiduciary has attempted to benefit from a questioned transaction.¹⁶⁵ At this point the burden of proof shifts to

¹⁵⁶475 N.E.2d at 340.

¹⁵⁷*Id.* at 340 n.2. *Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N.E. 912, *aff’d*, 161 Ind. 74, 67 N.E. 672 (1903).

¹⁵⁸475 N.E.2d at 340.

¹⁵⁹*Id.*

¹⁶⁰*Id.* at 341.

¹⁶¹409 N.E.2d 641 (Ind. Ct. App. 1980).

¹⁶²475 N.E.2d at 341. The court relied on *Forth*, 409 N.E.2d 641 (Ind. Ct. App. 1980), and *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891 (1956).

¹⁶³475 N.E.2d at 341.

¹⁶⁴*Id.* See *Cressy v. Shannon Continental Corp.*, 177 Ind. App. 224, 378 N.E.2d 941 (1978), discussed in Galanti, *Business Associations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 150-55 (1980); *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 157 Ind. App. 546, 301 N.E.2d 240 (1973), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 42-46 (1974). See also *Motor Dispatch, Inc. v. Buggie*, 177 Ind. App. 347, 353-54, 379 N.E.2d 543, 547 (1978).

¹⁶⁵See *Lucas v. Frazee*, 471 N.E.2d 1163 (Ind. Ct. App. 1984).

the fiduciary to overcome the presumption and show the actions were honest and done in good faith.¹⁶⁶ This approach is similar to the "two step" approach of the Minnesota courts in *Miller v. Miller*¹⁶⁷ and *A.C. Petters Co. v. St. Cloud Enterprises, Inc.*¹⁶⁸ These decisions adopt the flexible view that a corporate opportunity exists not only when the corporation has an actual interest in the property but also when the opportunity is closely associated with the existing or prospective activities of the corporation.¹⁶⁹ Once the threshold question of the opportunity is established by the corporation or a shareholder, the burden is shifted to the insider to show the questioned conduct was fair and equitable to the corporation. If this cannot be done, the corporation will prevail. This approach to the corporate opportunity doctrine protects the interests of the corporation and has the added benefit of protecting the interests of insiders who might be able to justify conduct which facially appears to usurp a corporate opportunity.¹⁷⁰ The *Dotlich* court did not expressly adopt this position, but it does fit the *Dotlich* result and is a logical continuation of cases like *Hartung*¹⁷¹ and *Cressy*.¹⁷²

Another interesting issue in *Dotlich* was the liability of Mechel Dotlich, who sided with his brother, defendant Monnie.¹⁷³ The court made it clear that normally a director is not liable for the misconduct of a co-director,¹⁷⁴ but a director who has participated in the wrongdoing,¹⁷⁵ or who learns of it and takes no action, or who acquiesces, is liable.¹⁷⁶ Mechel was found to have breached his duty when he learned of but did not disclose Monnie's claim, thus aiding and abetting Monnie's

¹⁶⁶*Id.* See also *Blaising v. Mills*, 176 Ind. App. 141, 374 N.E.2d 1166 (1978); *Schemmel v. Hill*, 91 Ind. App. 373, 169 N.E. 678 (1930); *Zaring v. Kelly*, 74 Ind. App. 581, 128 N.E. 657 (1920). Of course, defendants had the additional problem of appealing from a negative judgment and could prevail only if the evidence was uncontradicted and led unerringly to a conclusion different from that of the trial court. *Captain & Co. v. Town*, 404 N.E.2d 1159 (Ind. Ct. App. 1980).

¹⁶⁷222 N.W.2d 71 (Minn. 1974).

¹⁶⁸222 N.W.2d 83 (Minn. 1974).

¹⁶⁹222 N.W.2d at 79-80.

¹⁷⁰Compare *Petters*, 222 N.W.2d 83 (Minn. 1974), with *Irving Trust Co. v. Deutsch*, 73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935). See generally W. CARY & M. EISENBERG, *CORPORATIONS* 594-600 (5th ed. 1980); H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 237 (3rd ed. 1983).

¹⁷¹*Hartung v. Architects Hartung/Odle/Burke, Inc.*, 157 Ind. App. 546, 301 N.E.2d 240 (1973).

¹⁷²*Cressy v. Shannon Continental Corp.*, 177 Ind. App. 244, 378 N.E.2d 941 (1978).

¹⁷³475 N.E.2d at 343. Of course, Mechel did wish to keep title to his residence.

¹⁷⁴*Id.*

¹⁷⁵See *Rosenbloom v. Electric Motor Repair Co.*, 31 Md. App. 711, 358 A.2d 617 (1976); *McDonough v. Jones*, 48 Or. App. 785, 617 P.2d 948 (1980).

¹⁷⁶See *In re Illinois Acceptance Corp.*, 531 F. Supp. 737 (C.D. Ill. 1982); *Reid v. Robinson*, 64 Cal. App. 46, 220 P. 676 (1923).

breach.¹⁷⁷ This issue appears to be a close call, but what apparently tipped the case against Mechel was his failure to vote for the resolution to have all property titled in the corporate name.¹⁷⁸

Another corporate law issue decided in *Dotlich* was the appropriateness of appointing a receiver for the corporation. The court recognized that section 23-1-7-3(b)¹⁷⁹ of the General Corporation Act would not support the appointment because that section applies to involuntary dissolutions.¹⁸⁰ However, the court was satisfied that Indiana Code sections 34-1-12-1(3) and (7) support the appointment of a receiver in extraordinary cases where, as here, there appears to be overreaching by a controlling person.¹⁸¹

Both defendants appealed from the award of punitive damages.¹⁸² The award was affirmed as to Monnie but reversed as to Mechel.¹⁸³ The court concluded that even under the clear and convincing standard of *Traveler's Indemnity Co. v. Armstrong*,¹⁸⁴ Monnie's acts exceeded negligence and amounted to "willful, malicious and oppressive" conduct which is sufficient to support punitive damages.¹⁸⁵ It is interesting to note that punitive damages were assessed despite the fact that no compensatory damages were awarded.¹⁸⁶ Normally an award of compensatory damages is a prerequisite to punitive damages,¹⁸⁷ but *Dotlich* clearly puts Indiana among those jurisdictions which hold that equitable relief can support an award of punitive damages.¹⁸⁸ The constructive trust imposed on Monnie satisfied this element. Mechel, however, had not been sub-

¹⁷⁷475 N.E.2d at 343.

¹⁷⁸*Id.* at 343-44.

¹⁷⁹IND. CODE § 23-1-7-3(b) (1982).

¹⁸⁰*See* Crippen Printing Corp. v. Abel, 441 N.E.2d 1002 (Ind. Ct. App. 1982), *discussed in* Galanti, *Business Associations, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 31, 33-38 (1984). There was no showing of imminent irreparable injury that would have justified an involuntary dissolution.

¹⁸¹IND. CODE §§ 34-1-12-1(3), (7) (1982). *See* Tri-City Elec. Service Co. v. Jarvis, 206 Ind. 5, 185 N.E. 136 (1933).

The *Dotlich* court was satisfied that appointing the receiver was not an abuse of discretion because defendant Monnie was the managing director treating corporate property as his own. 475 N.E.2d at 344-45.

¹⁸²475 N.E.2d at 345.

¹⁸³*Id.* at 345-47.

¹⁸⁴442 N.E.2d 349 (1982).

¹⁸⁵475 N.E.2d at 346.

¹⁸⁶*Id.*

¹⁸⁷*See, e.g.,* Hahn v. Ford Motor Co., 434 N.E.2d 943 (Ind. Ct. App. 1982).

¹⁸⁸*Hedworth v. Chapman*, 135 Ind. App. 129, 192 N.E.2d 649 (1963). *See also,* Starkovich v. Noye, 111 Ariz. 347, 529 P.2d 698 (1974); Charles v. Epperson & Co., 258 Iowa 409, 137 N.W.2d 605 (1965); I.H.P. Corp. v. 210 Central Park S. Corp., 16 App. Div.2d 461, 228 N.Y.S.2d 883 (1962), *aff'd*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963); Kneeland v. Bruce, 47 Tenn. App. 136, 336 S.W.2d 319 (1960); National Bank of Commerce v. May, 583 S.W.2d 685 (Tex. Civ. App. 1979).

jected to either equitable relief or compensatory damages. Consequently, there was no justification for imposing punitive damages on him, and the award was reversed.¹⁸⁹

The defendants were successful in the area that perhaps affected them the most "out of pocket." The trial court had ordered them to reimburse the corporation approximately \$350,000 for attorney's fees, and ordered the corporation to pay the fees to the plaintiff's attorneys.¹⁹⁰ Because Indiana follows the American rule prohibiting an award of attorney fees against a losing party,¹⁹¹ the award could stand only if the case fell within one of three exceptions. "Obdurate behavior" was the one possible exception applicable, but because of a recent Indiana Supreme Court decision¹⁹² establishing that the exception is aimed at plaintiffs who bring baseless litigation, the *Dotlich* court concluded it did not apply. Here the corporation prosecuted the action, and, in any event, any obdurate behavior occurred before the suit.¹⁹³

In conclusion, *Dotlich* is a case that resolves and clarifies some issues of corporate law pertaining to closely held corporations, fiduciary duties, and derivative suits. *Dotlich v. Dotlich* is an all too common example of a closely held corporation run in a very informal manner. Informality normally does not create great problems, but as this case makes clear, people who operate corporations casually may end up losing in an intracorporate dispute.

V. PARTNERSHIP INTEREST VALUATION

Hamilton Airport Advertising, Inc. v. Hamilton,¹⁹⁴ decided during the survey period, is a case that might have been avoided if the partnership agreement had been better drafted. In *Hamilton*, the court affirmed in part and reversed in part a judgment of the Hancock Superior Court against defendants in a suit brought by the surviving spouse of a deceased partner, William Hamilton, against the partnership, the two surviving partners, and two affiliated corporations.¹⁹⁵

¹⁸⁹475 N.E.2d at 347.

¹⁹⁰*Id.*

¹⁹¹*Trotcky v. Van Sickle*, 227 Ind. 441, 85 N.E.2d 638 (1949).

¹⁹²*Kikkert v. Krumm*, 474 N.E.2d 503 (Ind. 1985).

¹⁹³The court did uphold reassessment of costs against the defendants, 475 N.E.2d at 348, and the award of attorney's fees in favor of the plaintiff's law firm against the corporation. *Id.* at 348-49. Charging the corporation with the shareholders' legal fees is customary in derivative suits because, after all, the suit should have been prosecuted by the corporation itself. See H. HENN & J. ALEXANDER, *supra* note 170.

¹⁹⁴462 N.E.2d 228 (Ind. Ct. App. 1984).

¹⁹⁵*Id.* at 230. The two surviving partners were brothers of the deceased. The three brothers were equal partners, and the sole shareholders, officers, and directors of the two corporations. *Id.*

After William's death, the plaintiff and one of the individual defendants executed a document estimating that the value of William's corporate shares under buy-sell agreements and the approximate value of his "interest" in the partnership was \$125,000.¹⁹⁶ Some payments were made to the plaintiff under this document. When payments were stopped, the plaintiff sued for breach of the valuation agreement, fraud, and an accounting.¹⁹⁷ The defendants moved to dismiss and filed a counterclaim.¹⁹⁸ The major dispute in *Hamilton* was over the meaning and interpretation of the buy-sell provision in the partnership agreement,¹⁹⁹ which specified that the price for the "interest" of a deceased partner was \$25,000 plus an amount equal to what would have been distributable to him out of net profits for the ensuing twelve months.²⁰⁰

The partnership was structured so that partnership funds were deposited in accounts called either drawing accounts or capital accounts.²⁰¹ The partners could not withdraw all funds in their accounts because the funds were needed as working capital.²⁰² The plaintiff characterized the difference between William's account at his death and the smaller of the two remaining accounts as a loan to the partnership. She claimed this amount in addition to the purchase price established by the buy-sell agreement.²⁰³ Defendants objected to treating the account as a loan because there was no promissory note as required by the partnership agreement.²⁰⁴ They argued that the estate had been overpaid because the amounts in the three accounts should have been averaged and this figure deducted from William's account.²⁰⁵ The trial court apparently accepted the plaintiff's figures in rendering judgment in her favor.²⁰⁶

¹⁹⁶*Id.* at 231.

¹⁹⁷*Id.*

¹⁹⁸*Id.* The defendants' motion to dismiss the accounting action was granted by the trial court. *Id.*

¹⁹⁹*Id.*

²⁰⁰*Id.* at 232.

²⁰¹*Id.*

²⁰²*Id.* William had drawn the least amount from his share of partnership earnings. *Id.*

²⁰³*Id.* at 233.

²⁰⁴*Id.* The defendants objected to the plaintiff's expert witness interpreting the partnership agreement. The court of appeals noted that the construction of written contracts is a question of law to be decided by the courts in the absence of ambiguity, *Interstate Auction, Inc. v. Central Nat'l Ins. Group, Inc.*, 448 N.E.2d 1094 (Ind. Ct. App. 1983); *English Coal Co. v. Durcholz*, 422 N.E.2d 302 (Ind. Ct. App. 1981), and that in such cases expert testimony on the matter of interpretation is improper. *Federal Life Ins. Co. v. Sayre*, 195 Ind. 7, 142 N.E. 223 (1924). The court characterized this evidence as not influencing the result in the case and ignored it as harmless error. 462 N.E.2d at 235.

²⁰⁵462 N.E.2d at 233. This reasoning does present the anomalous result of penalizing William for not drawing down his account.

²⁰⁶*Id.* at 234. The judgment was for approximately \$65,000. This included amounts

The trial court also appeared to have accepted the purported settlement agreement as valid and binding but then inconsistently admitted evidence as to the actual value of William's interest in the three ventures.²⁰⁷ The court of appeals concluded that the actual valuation issue had been tried by consent and that the reference to the settlement agreement was but a "minor technical" discrepancy.²⁰⁸ Consequently, it ignored the agreement²⁰⁹ and attempted to construe the terms of the partnership agreement "to determine exactly what the three partners contracted for and what they actually did."²¹⁰ In effect, the court did what the Hamiltons should have done by making it absolutely clear what their estates were to receive when they died.

The problem with the agreement was that it was unclear in its definition of "drawing accounts." The relevant paragraph referred to distribution of earnings as well as to specific withdrawals necessary for the payment of income taxes.²¹¹ The court concluded that partnership earnings had been distributed equally to each partner and that this was proper.²¹² Consequently, William's estate was entitled to the funds remaining in his account.²¹³

The *Hamilton* court then had to consider the proper price for William's interest under the partnership buy-sell provision. There was no dispute that the price for his "share and interest in the partnership" was to be \$25,000 plus one-third of the net profits of the business for the next year,²¹⁴ but the parties disagreed whether the price was for all claims and interests in the partnership, including William's partnership account. The court concluded it was not.²¹⁵ Again, the problem stemmed from the agreement's reference to "drawing accounts," although proper drafting of partnership agreements calls for two separate accounts for each partner: a capital or investment account and a current or drawing

owed under the corporate buy-sell agreements which were not in dispute and prejudgment interest. *Id.* at 234-35.

²⁰⁷*Id.* at 235.

²⁰⁸*Id.*

²⁰⁹*Id.*

²¹⁰*Id.* at 236. The court itself pointed out one example of faulty drafting of the documents. *Id.* at n.6.

²¹¹The court concluded distribution did not mean disbursement and it was not a substitute for withdrawal, but rather meant that funds were to be divided equally among the three, whether withdrawn or not. 462 N.E.2d at 237. This is analogous to federal income taxation of partnerships where a partner's share of current partnership net earnings is deemed to be distributed at the close of the tax year regardless of whether the funds were actually distributed. *Stackhouse v. United States*, 441 F.2d 465 (5th Cir. 1971).

²¹²462 N.E.2d at 236.

²¹³*Id.*

²¹⁴*Id.* at 237.

²¹⁵*Id.*

account.²¹⁶ The court concluded that funds left in each partner's account were capital,²¹⁷ rather than loans, particularly since there were no promissory notes. The court followed the view expressed in the early New Jersey case of *Molineaux v. Raynolds*²¹⁸ that funds not drawn out at the end of the year but left in the business with the acquiescence of all partners are to be treated as capital contributions unless accumulated earnings are specifically excluded from capital accounts.²¹⁹

There is an irony here. The court accepted the position urged by the defendants by refusing to treat William's account as a loan, but rejected their related contentions that the agreement's reference to the "entire share and interest in the partnership" meant just what it said. Instead, the court found that "interest" did not include repayment of William's capital contribution.²²⁰ The court reasoned that under the Indiana General Partnership Act a partner's "interest" in the partnership is his or her share in the profits and surplus of the venture²²¹ excluding capital contributions.²²²

Distinguishing between profits and surplus on one hand and capital on the other is correct, but the *Hamilton* court's next step of excluding the capital account from the buy-sell agreement might be questioned. It could be an unwise move financially, but partners can agree as to their rights *inter se*,²²³ even allowing surviving partners to take all partnership property and the estate of a deceased partner to take nothing.²²⁴ Perhaps the Hamiltons really intended the agreed purchase price to cover everything. Under the Uniform Partnership Act, a sale of a partner's interest entitles the purchaser only to the assigning partner's profits.²²⁵ The Act is silent as to capital owed the selling partner, but if the

²¹⁶See generally M. VOLZ & A. BERGER, *THE DRAFTING OF PARTNERSHIP AGREEMENTS* 116-17 (6th ed. 1976).

²¹⁷462 N.E.2d at 238. The court noted there are cases where cash contributions to capital are labeled "capital accounts," citing *J.M. Schultz Seed Co. v. Robertson*, 451 N.E.2d 62 (Ind. Ct. App. 1983), although in *Robertson* the court found no partnership existed. See generally Galanti, *Business Associations, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 57, 73-76 (1985).

²¹⁸35 A. 536 (N.J. Ch. 1896).

²¹⁹462 N.E.2d at 238-39. Accumulated earnings will not be treated as capital if excluded by agreement. *Dore v. LaPierre*, 226 N.Y.S.2d 949 (N.Y. Sup. Ct. 1962).

²²⁰462 N.E.2d at 239.

²²¹IND. CODE § 23-4-1-26 (1982).

²²²*Id.* §§ 23-4-1-40(b)(3), (4). Capital is treated differently because it is a liability of the partnership owed to a partner, while a partner's interest is, in effect, a partnership asset.

²²³See *Trifunovic v. Marich*, 168 Ind. App. 464, 343 N.E.2d 825 (1976).

²²⁴See generally J. CRANE & A. BROMBERG, *supra* note 134, at 508 n.46.

²²⁵IND. CODE § 23-4-1-27(1) (1982).

partnership is subsequently dissolved, the purchaser or assignee is entitled to the assignor's interest in partnership property.²²⁶

The court, however, probably is right in requiring a clearer indication that the term "interest" should be construed broadly before excluding repayment of capital.²²⁷ After all, it is not likely the Hamiltons would have left their funds in the business if they had known they were going to receive only \$25,000 plus one year's earnings. Of course, it would have been better if the agreement had spelled out the treatment of the capital account as well as any other accounts,²²⁸ and the litigation might have been avoided if they had done so.

It is also possible to wonder why the court of appeals did not follow the trial court's lead and enforce the purported settlement agreement valuing William's interest in all three ventures at \$125,000. Payments to plaintiff plus the judgment approximated this figure. Perhaps receiving evidence as to the actual value of the enterprise should have been treated as the "minor technical discrepancy." After all, the surviving spouse and the surviving partner who signed the settlement agreement must have meant something by the \$125,000 amount. It could have been their estimation of the entire value of William's interest in the two corporations and the partnership.

If this is the case, there is a two-fold message in *Hamilton*. Valuation provisions in buy-sell agreements should be drafted carefully. If they are not, the parties might be well-advised to abide by any conclusions about the value of a decedent's interest rather than litigating the question.

VI. STATUTORY DEVELOPMENT

1. *Corporation Law Study Commission*.—The most significant statutory development during the survey period might be better described as a potential development. The General Assembly established a General Corporation Law Study Commission²²⁹ to consider revising the present Indiana General Corporation Act. The present Act was adopted in 1929.²³⁰ It has been subject to several major revisions,²³¹ and some amendments to the Act are passed in almost every session of the General Assembly. However, there has not been a complete examination of Indiana's statutory corporate law in over fifty years. It is rather obvious that the

²²⁶*Cf.* *Parker v. Donald*, 477 S.W.2d 947 (Tex. Civ. App.), *rev'd*, 482 S.W.2d 846 (1972).

²²⁷This raises the interesting question of what would have happened if the partnership had no assets after repaying the capital accounts. Presumably, under the court's reasoning, it would still be obligated to purchase the interest for \$25,000.

²²⁸*See generally* M. VOLZ & A. BERGER, *supra* note 216, at 16.

²²⁹Act of April 16, 1985, Pub. L. No. 362-1985, § 1.

²³⁰Acts of 1929, ch. 215, § 1.

²³¹Acts of 1949, ch. 194, § 1; Acts of 1967, ch. 275, § 1.

corporate world of 1929 is quite different from the corporate world of 1986. A statute that was advanced for the time has become obsolete to a significant extent, and provisions which caused no problems to the corporate bar then are now obstacles to efficient structuring and management of corporations.

The present Act gives the organizers of a corporation some flexibility in structuring the corporation to fit their desired goals and objectives. This is particularly true for small closely held corporations which have been aptly described as "incorporated partnerships."²³² Unfortunately, there are some provisions in the Act that can cause problems if the drafter of the articles is not careful.²³³ At the other end of the size spectrum, the relatively recent phenomenon of massive corporate takeovers with a myriad of defensive moves by management is raising problems not contemplated by the drafters of most current corporation acts. Some proposed statutory responses to tender offers might be undesirable,²³⁴ but some statutory changes aimed at the more egregious features of the current tender offer scene, such as "greenmail,"²³⁵ might be worthwhile.

The Study Commission primarily is considering the Revised Model Business Corporation Act (1984) adopted by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association.²³⁶ The Revised MBCA strikes, on the whole, a good balance between the interests of corporate management, which desires "flexibility," and the interests of passive shareholders who some-

²³²Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 552, 301 N.E.2d 240, 243 (1973).

²³³For example, certain provisions in the Act are optional with the drafter if specified in the articles while others can be specified in either the articles or the bylaws. *Compare* IND. CODE § 23-1-2-11(g) with § 23-1-2-11(i).

Many states have adopted statutes specifically drafted for closely held corporations. *See, e.g.*, MD. CODE ANN. CORPS. & ASS'NS §§ 4-101 to -603 (1985). There is also a Model Statutory Close Corporation Supplement Appended to the Revised Model Business Corporation Act. 3 MODEL BUSINESS CORP. ACT ANN. § 1803-79 (3d ed. 1985). Presumably, the Study Commission will consider adopting a special close corporation statute. There are arguments that broad general statutes coupled with judicial liberality give drafters of articles of incorporation sufficient flexibility, *see* *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964), and that specific statutes might impose arbitrary restrictions. The benefits of a statute, however, would seem to outweigh any detriments. *See generally* W. CARY & M. EISENBERG, *supra* note 170, at 400-09.

²³⁴For example, the New York legislature passed a bill intended to thwart Ted Turner's takeover of C.B.S. The editors of *The Wall Street Journal*, *Wall St. J.*, July 10, 1985, at 24, col. 1, not surprisingly opposed the bill and urged Governor Mario Cuomo to veto it.

²³⁵Greenmail is the practice of a corporate suitor acquiring a substantial block of shares of a target company with the intent of having management purchase the shares at a hefty profit rather than with the intent of actually pursuing a tender offer.

²³⁶REVISED MODEL BUSINESS CORP. ACT §§ 1.01 to 17.06 (1984).

times lose out in what Justice Brandeis characterized as the "race of the lax."²³⁷

There is only one problem this author sees with adopting the Revised MBCA. The General Assembly might not be able to apply a new corporation act to Indiana corporations organized since July 1, 1978, unless the provisions of the new Act are expressly adopted by those corporations. July 1, 1978, was the effective date of the repeal of section 23-1-12-5 of the Indiana General Corporation Act.²³⁸ This provision was the "reservation of powers" clause that reserved to the legislature the right to amend or repeal the law relating to corporations.

The reserved powers clause was not in the present Act when it was adopted in 1929. It was added in 1949.²³⁹ Frederick Schortemeier, who chaired the Indiana Corporations Survey Commission at the time, commented that it was felt the state had "inherent power" to amend the Corporation Act but that it was advisable to make the power express.²⁴⁰ The repeal of section 23-1-12-5 at least raises the possibility that a court will rule that the General Assembly decided in 1978 that Indiana should not have authority to affect subsequently organized corporations by amending or repealing the Act.

The drafters of the Revised MBCA operated on the premise that the Act should apply to all existing as well as new corporations.²⁴¹ They also intended it to be a substitute for existing general incorporation statutes²⁴² and recommended against retaining portions of earlier statutes.²⁴³ Of course, they also operated on the premise that there has been a "universal adoption of 'reservation of power' clauses in all states for more than a century . . .,"²⁴⁴ which is not the case in Indiana.

²³⁷Liggett Co. v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

²³⁸Act of July 1, 1978, Pub. L. No. 2-1978, § 3602, 1978 Ind. Acts 472 (repealing IND. CODE § 23-1-12-5 (1972)).

²³⁹Acts of 1949, ch. 194, § 22.

²⁴⁰F. SCHORTEMEIER, INDIANA CORPORATION LAW 206 n.11 (1952).

²⁴¹REVISED MODEL BUSINESS CORP. ACT § 17.01 (1984).

²⁴²3 MODEL BUS. CORP. ACT ANN. § 17.05, official comment at 1800 (3d ed. 1985).

²⁴³*Id.*

²⁴⁴*Id.* § 17.01, official comment at 1797. Section 1.02 of the Revised Model Business Corporation Act is the reservation of powers clause.

There is dictum in *City of Indianapolis v. Navin*, 151 Ind. 139, 143, 47 N.E. 525, 526-27 (1897), that the legislature had inherent power to regulate fares of a common carrier. This might be the source of Mr. Schortemeier's comment, *supra* note 240. However, the court's statement was merely dictum because the legislature had reserved the power. Furthermore, the court recognized that the power over fares would be surrendered by "clear and unmistakable language" inconsistent with the exercise of such power. *Id.* There is no clearer or more unmistakable statement of legislative intent to surrender the reserved power than expressly repealing the clause.

The decision in *State ex rel. Stanley v. Alaska Airlines, Inc.*, 68 Wash. 2d 318, 413 P.2d 352 (1966), contrasts with the *Navin* dictum. In *Alaska Airlines*, the court held that

As of this writing, the author does not know how the Study Commission will handle the problem caused by the repeal of section 23-1-12-5, assuming it agrees that there is a problem. Perhaps it will not, and a new Indiana General Corporation Act will be made applicable to existing Indiana corporations. Maybe there does not have to be an express reserved powers clause as contemplated by section 17.01 of the Revised MBCA, but certainly any lawyer worthy of the title "professional" would argue that a new Corporation Act could not apply to corporations organized after July 1, 1978, when it was in his or her client's interest that it not be applied. Of course, the same can be said about all amendments to the Indiana General Corporation Act adopted since 1978.

2. *Securities Act Registration.*—Although it will affect relatively few corporations, an amendment to section 2 of the Indiana Securities Act²⁴⁵ recognizes the maturing of the over-the-counter securities market. The amendment added a new subsection exempting securities designated for trading in the National Association of Securities Dealers Automatic Quotation (NASDAQ) National Market System (NMS), from the Act's registration requirements.²⁴⁶

This amendment puts companies in the NMS on par with companies with securities listed or approved for listing on the major stock exchanges.²⁴⁷ Such companies are exempt from the registration requirements of state securities acts²⁴⁸ because of the belief that the listing standards of the exchanges coupled with the disclosure requirements imposed on the public sale of securities by the Securities Act of 1933²⁴⁹ adequately protects the interest of investors. Subjecting these companies to additional registration requirements merely increases the cost of an offering with no gain to the investing public.

The NMS includes the soundest and most seasoned companies traded over-the-counter.²⁵⁰ NASDAQ criteria and public information on NMS companies is similar to that available on listed companies, so a similar

provisions in the Model Business Corporation Act which had been adopted in Alaska could not be made applicable to a corporation organized under the previous territorial corporation act which had not contained a reservation of powers clause.

²⁴⁵Act of April 18, 1985, Pub. L. No. 232-1985, § 2 (codified at IND. CODE § 23-2-1-2(a)(11) (Supp. 1985)). The act also exempts securities designated for trading on any other national market system approved and designated by the Indiana Securities Commissioner, any other security of the same issuer that is of senior rank or of substantially equal rank, any security called for by subscription rights or warranty so listed or approved, or any warrant or right to purchase or subscribe to any of these securities. *Id.*

²⁴⁶IND. CODE § 23-2-1-2 (1982).

²⁴⁷*Id.* § 23-2-1-2(a)(5).

²⁴⁸*See, e.g.,* UNIF. SEC. ACT § 402(a)(8), 7B U.L.A. 600 (master ed. 1968).

²⁴⁹15 U.S.C. § 77(e) (1982).

²⁵⁰Approximately 1700 of the 4700 companies quoted on NASDAQ are in the NMS.

registration exemption is appropriate.²⁵¹ Indiana is the first state to recognize the stature of the NMS by a registration exemption, but it would be very surprising if this exemption does not become commonplace.

The merit of the new amendment is not the number of companies it will affect, but the recognition of the waste in requiring seasoned, sound companies to register securities under both the federal and state securities acts. Eliminating the state requirement will reduce the red tape involved in public securities offerings of NMS companies, thus expediting the raising of capital. Of course, companies that do not meet the NMS requirements, even if they are quoted in NASDAQ, must still satisfy the registration or qualification requirements of the Indiana Securities Act, which protects the interest of Indiana investors. Also, it is important to note that the exemption of section 23-2-1-2(a) is from the registration requirements of the Act and not the antifraud provisions²⁵² which apply to the sales of such securities.²⁵³

3. *Share Exchanges*.—The past session of the General Assembly authorized the acquisition of a corporation's shares by a share exchange, cash, other consideration, or a combination of the three.²⁵⁴ It also set out the procedures for an exchange.²⁵⁵ The net effect of sections 23-1-5-1(3) and 23-1-5-9 is to provide a procedure for the direct exchange of shares in a corporate acquisition while maintaining the same safeguards and rights available to shareholders of corporations participating in mergers or consolidations.

Katterjohn, *Indiana Exempts Certain NASDAQ Stocks*, Indpls. Bus. J., April 22-28, 1985, at 3A, col. 1.

²⁵¹*Id.* at 16A, col. 4. The NMS exemption will not affect many Indiana corporations. There are 17 Indianapolis over-the-counter stocks included in the NMS System, and three others are eligible for inclusion but have not yet been added. *Id.*

²⁵²IND. CODE § 23-2-1-12 (1982).

²⁵³The new amendment also repealed the registration exemption for memberships issued by nonprofit organizations, IND. CODE § 23-2-1-2(a)(6) (1984) (repealed 1985); authorized the Securities Commissioner to impose civil penalties on violators of the Indiana Securities Act, *id.* § 23-2-1-19.5 (Supp. 1985); exempted from registration the offer or sale of securities pursuant to a statutory exchange, *id.* § 23-2-1-2(b)(15) (amended 1985); and made minor stylistic changes.

²⁵⁴Act of April 14, 1985, Pub. L. No. 231-1985, § 1 (amending IND. CODE § 23-1-5-1(3) (Supp. 1985)).

The Act made minor revisions to other provisions of the General Corporation Act to integrate the new procedure into the existing act. This includes amending IND. CODE § 23-1-11-15 (Supp. 1985), to authorize the exchange of securities with a foreign corporation if such an exchange is permitted by the laws of the state under which the foreign corporation is organized.

Since 1977, the Indiana Insurance Law has contained provisions authorizing an exchange of securities of insurance companies. IND. CODE §§ 27-3-1-1 to -7 (1982).

²⁵⁵Act of April 14, 1985, Pub. L. No. 231-1985, § 2 (adding IND. CODE § 23-1-5-9 (Supp. 1985)).

The new provisions recognize that parties to a corporate combination might wish to keep the acquired corporation as a separate and distinct entity, as opposed to merging or consolidating. This result could be obtained before section 23-1-5-1(3) was adopted, but it was a complicated procedure. The acquiring corporation had to form a new subsidiary into which the acquired corporation merged, with the shares of the acquired corporation being converted into the shares of the parent corporation. Section 72A of the Model Business Corporation Act is similar but not identical to section 23-1-5-1(3). The drafters of the MBCA commented when section 72A was added in 1976: "This procedure is often cumbersome and requires the utilization of a number of extraneous technical steps that have no real substance."²⁵⁶

As mentioned, section 23-1-5-1(3) and the procedures of section 23-1-5-9 are similar but not identical to the share exchange provisions of the MBCA and the Revised MBCA. To a degree, the Model Act gives more protection to shareholders. For example, under both the Indiana General Corporation Act and the Model Acts, only shareholders whose shares are to be acquired are entitled to vote on a share exchange.²⁵⁷ The Model Acts, however, require that a notice of the shareholder meeting to consider the plan, including a copy or summary of the plan, must be sent to each shareholder of record whether or not entitled to vote. The Indiana Act requires only that notice be sent to those shareholders *not* entitled to vote, within five days after the plan is adopted by the shareholders.²⁵⁸ This might be a minor point, but shareholders whose shares are not being acquired might wish to sell or otherwise dispose of their shares if they think the proposed transaction is not in their financial interest. By the time they learn of the transaction, it could be a *fait accompli* adversely affecting the value of their shares.²⁵⁹ Not many investors will be in this position, but there is no reason why their interests should not be protected. Presumably, the Study Com-

²⁵⁶31 BUS. LAW 1747, 1752 (1976). See MODEL BUSINESS CORP. ACT § 72A (1979). Sections 72A of the MBCA, and §§ 73, 74, 76-77 and 80 of the MBCA, which were amended in 1976 to conform to § 72A, are contained in chapter 11 of the Revised MBCA. REVISED MODEL BUSINESS CORP. ACT §§ 11.01-.03, 11.05-.07 (1984). Dissenters' rights which might be available to shareholders of acquired corporations are provided for in chapter 13 of the Revised MBCA. REVISED MODEL BUS. CORP. ACT §§ 13.01 to .31 (1984).

²⁵⁷Compare IND. CODE § 23-1-5-9(c)(1) (Supp. 1985) with MODEL BUSINESS CORP. ACT § 73 (1979) and REVISED MODEL BUSINESS CORP. ACT § 11.03(f)(2) (1984).

²⁵⁸Compare IND. CODE §§ 23-1-5-2(d) and -1-5-9(c) (Supp. 1985) with MODEL BUSINESS CORP. ACT § 73 (1979) and REVISED MODEL BUSINESS CORP. ACT §§ 7.05, 11.03 (1984).

²⁵⁹Under both statutes, neither are the shareholders of the acquiring corporation entitled to vote on the proposed exchange, nor do they have dissenters' rights. Compare IND. CODE § 23-1-5-7(a) (1982) with MODEL BUSINESS CORP. ACT § 80 (1979) and REVISED MODEL BUSINESS CORP. ACT § 13.02(a)(2) (1984).

mission will choose to track more closely the provisions of the Revised MBCA in this regard.

There appears to be a slight problem with the language of section 23-1-5-9(c)(2).²⁶⁰ This provision states the agreement of exchange is "adopted upon receiving affirmative votes."²⁶¹ Presumably, this should read as adoption upon receiving the affirmative votes of a majority of the class of shares whose shares are being acquired, and a majority of the shares of each class if more than one class is being acquired.²⁶² This would track the language of section 23-1-5-2(b) relating to approval of mergers.²⁶³

It should be noted that section 23-1-5-1(3) applies only to situations where both corporations approve the proposed transaction. It would not apply to a hostile tender offer where the respective boards of directors could never agree to terms. Section 23-1-5-9(1) specifically provides that the authorized procedures do not limit a corporation's power to acquire shares of another corporation through a voluntary exchange or otherwise by agreement of the shareholders.²⁶⁴

All in all, the goal of simplifying the procedures for a share exchange is laudable. The apparent drafting error concerning shareholder approval should be remedied by the General Assembly, but this will not be necessary if the Corporation Law Study Commission proposes that Indiana adopt the Revised MBCA. Of course, there remains the question of whether the new procedures would be available for corporations organized after July 1, 1978.

²⁶⁰IND. CODE § 23-1-5-9(c)(2) (Supp. 1985).

²⁶¹*Id.*

²⁶²The model acts require approval by a majority vote, or even greater than a majority if required by the articles of incorporation or specified by the board of directors. MODEL BUSINESS CORP. ACT § 73 (1979); REVISED MODEL BUSINESS CORP. ACT § 11.03(e) (1984).

²⁶³IND. CODE § 23-1-5-2(b) (1982). Of course, if § 23-1-5-9(c)(2) really means that a plan is adopted upon receipt of at least two affirmative votes, it is highly unlikely that the agreement would be reaffirmed by the directors of each corporation as required by § 23-1-5-9(f). Presumably, the number of dissenting shareholders wishing to exercise dissenters' rights would make the deal uneconomical.

²⁶⁴*Compare* IND. CODE § 23-1-5-9(j) (Supp. 1985) *with* MODEL BUSINESS CORP. ACT § 72A (1979) *and* REVISED MODEL BUSINESS CORP. ACT § 11.02(d) (1984).

Changes in the Uniform Commercial Code

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I. INTRODUCTION

Effective January 1, 1986, Indiana took its place among the vast majority of jurisdictions which have adopted the 1972 Official Text of the Uniform Commercial Code ("UCC").¹ Indiana's version of the Official Text amends thirty-five sections of the UCC (including thirty of the fifty-seven sections in Article 9), adds two new sections,² and adds a new Article 11 which creates a transition period and repeals the greater part of former Article 10. The changes are confined almost entirely to Article 9, which deals with secured transactions, and a number of sections are changed very little.³

II. THE SCOPE OF ARTICLE 9

The basic scope provision remains section 9-102,⁴ but the section was revised by deleting the phrase "personal property and fixtures within the jurisdiction of this state" so that revised Article 9 may now cover all consensual security interests in personal property (and fixtures) other than the twelve exceptions enumerated in section 9-104,⁵ regardless of whether or not the collateral is physically located within the state. Certain sales of accounts and chattel paper are also included, hence the title "Secured Transactions, Sales of Accounts and Chattel Paper." In addition, new section 9-114 imposes upon "real" consignors⁶ filing and notice responsibilities comparable to those imposed upon inventory secured parties.⁷

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¹Indiana's adoptions of the UCC are codified in Title 26 of the Indiana Code.

²The additions, taken from §§ 9-114 and 9-412 of the UCC, are codified in IND. CODE §§ 26-1-9-114 and -9-412 (Supp. 1985).

³The most striking illustration of this proposition is provided by the inclusion in the 1985 amendments of a number of sections for the sole purpose of deleting the now superfluous term "contract right." The authors of the model act concluded that if "contract right" were enlarged to include *prospective* or future accounts as well as present ones, the expanded term plus the term "general intangible" would suffice. See IND. CODE § 26-1-9-106 (Supp. 1985).

⁴IND. CODE § 21-1-9-102 is supplemented by §§ 26-1-9-103, -104, -113, and § 26-1-1-201(37) (1982 & Supp. 1985).

⁵IND. CODE § 26-1-9-104 (Supp. 1985).

⁶*Id.* § 26-1-9-114. In this context, a "real consignment" is one which is not a security interest, but which, nonetheless, requires perfection by filing as indicated in IND. CODE § 26-1-2-326(3)(c) (1982).

⁷See IND. CODE § 26-1-2-326 (1982).

III. CONTROLLING LAW IN MULTIPLE STATE TRANSACTIONS

The question of which jurisdiction's version of the Code *controls* a transaction had been treated primarily under section 9-103.⁸ The 1962 version of section 9-103 addressed the validity *and* the perfection aspects of a variety of types of collateral and the law applicable to each. Revised Article 9-103 addresses the perfection of security interests in five different types of collateral in multiple state transactions, including the effect of perfection (or non-perfection), but does not address the validity of a security interest.⁹ In general, controlling law will depend upon whether the collateral is tangible or intangible. If the collateral is tangible (or likely to remain in one place once it is installed or delivered), the basic rule under revised section 9-103 concludes that the law of the jurisdiction where the collateral was located when the last event necessary for perfection occurred controls the issue of perfection and the effect of perfection.¹⁰ If intangible, the law of the jurisdiction where the debtor is located tends to control.¹¹ Revised section 9-103, then, identifies applicable law as to documents, instruments, and ordinary goods,¹² goods evidenced by certificates of title,¹³ accounts, general intangibles and mobile goods,¹⁴ chattel paper,¹⁵ and minerals.¹⁶

IV. CHOICE OF LAW

Under amended section 1-105,¹⁷ the parties' ability to choose applicable law is expanded because the area *not* within the parties' choice with respect to Article 9 has been reduced. Under the former section 1-105 rule, the parties appeared to be able to select the jurisdiction whose law would apply to their secured transaction, assuming the transaction bore a reasonable relationship to that jurisdiction.¹⁸ However, an enormous exception existed with respect to Article 9. This exception was phrased in section 1-105(2) as "Policy and Scope of the Article on Secured Transactions."¹⁹ For purposes of Article 9, at least, the exception

⁸*Id.* § 26-1-9-103 (Supp. 1985).

⁹Note that IND. CODE § 26-1-9-103 (Supp. 1985) does not deal with *choice* of law, which is covered by IND. CODE § 26-1-9-105 (Supp. 1985), but with *controlling* law. Choice of law considerations are addressed at *infra* notes 17-21 and accompanying text. Validity (enforceability) is now addressed in IND. CODE § 26-1-9-203 (Supp. 1985).

¹⁰IND. CODE § 26-1-9-103(1)(b) (Supp. 1985).

¹¹*Id.* § 26-1-9-103(3)(b).

¹²*Id.* § 26-1-9-103(1).

¹³*Id.* § 26-1-9-103(2).

¹⁴*Id.* § 26-1-9-103(3).

¹⁵*Id.* § 26-1-9-103(4).

¹⁶*Id.* § 26-1-9-103(5).

¹⁷*Id.* § 26-1-1-105.

¹⁸*See id.* § 26-1-1-105 (1982).

¹⁹*Id.* § 26-1-1-105(2).

appeared to swallow the rule. Under amended section 1-105(2), this restriction on the parties' ability to choose applicable law was reduced to matters "concerning perfection of secured transactions."²⁰ Perfection, in this context, would concern only the effect of a security interest on third parties. Therefore, non-perfection issues, such as validity between the immediate parties and rights upon default, are now governed by the section 1-105 choice of law rules.²¹ Admittedly, choice of law was a far more significant subject when the UCC was new and adopted in only a handful of states. Nonetheless, variations continue from state to state, not to mention the unique law of Louisiana.

V. ATTACHMENT AND ENFORCEABILITY

Sections 9-203 and 204²² have been substantially modified and their components shifted. The concept of "attachment" (dealt with in former section 9-204) and "enforceability" (dealt with in former section 9-203) have been consolidated into a single section.²³ The conceptual elements of (1) agreement, (2) value, and (3) rights on the debtor's part in the collateral have been switched from section 9-204 to section 9-203 where they now supplement the elements necessary to make a security interest enforceable against the debtor and third parties, i.e., physical possession of the collateral or a signed security agreement.²⁴ Also deleted from amended section 9-203(1)(b) is the troublesome reference to proceeds which implied that a security agreement had to specify proceeds if a security interest was to attach to proceeds.²⁵ Under amended Article 9, a security interest grant respecting proceeds need no longer appear in the security agreement. Instead, amended 9-203(3) presumes proceeds as a derivative right.²⁶ These changes reduce the scope of new section 9-204 to after-acquired collateral and future advances, and eliminate the near useless one-year limitation of crop security interests under old section 9-204(4)(a).²⁷ The priority of future advances, however, is limited by a

²⁰*Id.* § 26-1-1-105(2) (Supp. 1985).

²¹*Id.* § 26-1-1-105. Under this provision, whenever a transaction between parties bears a reasonable relation to Indiana and also to another state or nation, the parties may choose which state or nation's law will govern their rights. Absent such an agreement, the Indiana provisions apply to transactions which bear an appropriate relation to the state. *Id.*

²²*See id.* §§ 26-1-9-203, -204.

²³*Id.* § 26-1-9-203.

²⁴*Id.*

²⁵*See id.* § 26-1-9-203(1)(b).

²⁶*Id.* § 26-1-9-203(3).

²⁷The one-year limit respecting a security interest in crops was largely ineffective because the crop financing statement could last for five years, and priority normally depends upon date of filing rather than date of grant. Assuming the farmer would sign each spring when asked to do so, the holder of the earliest financing statement effectively

new forty-five day provision in sections 9-301(4), 307(3), and 312(7), unless these advances are made "pursuant to commitment," a term defined in section 9-105(k).²⁸ Apparently the forty-five day period was chosen to correspond to the Internal Revenue Code provision concerning federal tax liens.²⁹

VI. PRIORITIES

Part 3 of Article 9, which deals with priorities among purchasers, lien creditors (and bankruptcy trustees), and secured creditors, may very well be the most important segment of Article 9. Unlike Article 2, for example, which attempts to construct a set of rules by which the parties to a sales agreement can measure the scope and effect of their bargain, Article 9 focuses on the effect of a (secured transaction) bargain upon third parties. To do so, Article 9 establishes a set of rules for ranking a particular security interest against other security interests and non-Article 9 liens. It is for this reason that priority considerations join validity and rights on default as the major substantive contributions of Article 9.

Although Part 3 has eighteen sections, its heart is to be found in section 9-312.³⁰ In turn, the heart of section 9-312, i.e., the general rule, is to be found in subsection (5), which addresses conflicting security interests in the same collateral. In place of the old three-way ranking system (in order of filing, in order of perfection, in order of attachment), a two-way ranking system is substituted (in order of filing *or* perfection and in order of attachment) and a new subsection (7) addresses future advances and distinguishes between those made pursuant to commitment and otherwise.³¹

controlled crop financing for a five-year period. The rewriting of § 9-204(2) had a second consequence which may be less salutary. The statutory definitions of precisely when the debtor acquires rights in planted crops, caught fish, extracted minerals and the like have disappeared.

²⁸IND. CODE § 26-1-9-301(4) (Supp. 1985) appears to subject the lien creditor (defined in § 26-1-9-301(3)) not only to the 45-day protected period but also to an indefinite further extension if the secured creditor making future advances lacks knowledge of the lien. The new 45-day limitation is also found in IND. CODE § 26-1-9-307(3) and -312(7) (Supp. 1985). "Pursuant to commitment" is defined in IND. CODE § 26-1-9-105(k) (Supp. 1985). The effect of this provision in bankruptcy is unclear, especially in light of the bankruptcy trustee's avoidance powers under 11 U.S.C. § 544 (1982), powers which do not depend upon a competing creditor's factual ignorance.

²⁹26 U.S.C. § 6323(c)(2), (d) (1982).

³⁰IND. CODE § 26-1-9-312 (Supp. 1985). IND. CODE § 26-1-9-313 (Supp. 1985), which concerns fixtures, deals extensively with priorities but will be separately treated in this article. See *infra* notes 47-63 and accompanying text.

³¹IND. CODE § 26-1-9-312(7) (Supp. 1985). The irony of the presupposed "commitment" in § 26-1-9-105(k) lies at the end of the definition, which recognizes a commitment

Section 9-312 also preserves the purchase money priority over pre-existing security interests in non-inventory, assuming perfection is within fifteen days following delivery.³² However, the changes concerning purchase money security interests in inventory are more significant. First, perfection by the time of delivery remains a requirement,³³ as does the need for a pre-filing notification.³⁴ Second, the pre-filing notification must now be *written* and lasts for *five years*.³⁵ On balance, inventory lenders are probably supported by these two changes because doubt clouded both of these issues. The newly created five-year duration corresponds to the five-year duration of a financing statement under amended section 9-403(2).³⁶

Third, an inventory purchase money security interest extends only to identifiable *cash* proceeds received on or before delivery of the inventory to a buyer; a sale on credit (which creates an account) divests the purchase money supplier of his "super" priority.³⁷ This reflects a compromise between the competing claims of those who finance inventory and those who finance accounts receivable. Even so, because most sales of inventory are not for cash, the compromise favors those who finance accounts. Finally, the hotly debated issue of whether, as between conflicting security interests, a priority as to the original collateral automatically conferred the same priority as to proceeds is resolved in the affirmative in section 9-312(6).³⁸

Section 9-312(2), the largely ineffective subsection which supposedly encourages suppliers to offer new credit to encumbered farmers remains unchanged.³⁹ Elimination of the restrictive phrase "due more than six months before the crops become growing crops" would have made this subsection meaningful because most competing secured claims will not have been *due* for at least six months when the farmer applies in the spring for his annual crop financing.

"whether or not a subsequent event of default or other event not within [the secured party's] control has relieved or may relieve him from his obligation." If the creditor, for whatever reason, has been relieved of his obligation to make a future advance, one cannot describe such an advance as being pursuant to commitment. For additional comments regarding lender "commitments," see Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 506 n.79 (1973).

³²IND. CODE § 26-1-9-312(4) (Supp. 1985). This 15-day period is a heterodox provision. The standard period under § 9-312(4) in most jurisdictions is 10 days.

³³IND. CODE § 26-1-9-312(3)(a) (Supp. 1985).

³⁴*Id.* § 26-1-9-312(3)(d).

³⁵*Id.* § 26-1-9-312(3)(b), (c).

³⁶*See id.* § 26-1-9-403(2).

³⁷*Id.* § 26-1-9-312(3).

³⁸*Id.* § 26-1-9-312(6).

³⁹*Id.* § 26-1-9-312(2).

VII. PROCEEDS

When collateral is sold, the security interest automatically attaches under amended section 9-203(3) to whatever property is received in exchange.⁴⁰ This substitute constitutes the "proceeds" of the sale. The basic proceeds provision is section 9-306,⁴¹ although it is supplemented by section 9-312(4), the automatic attachment of non-inventory proceeds, and by section 9-312(3), the corresponding, but more limited, automatic attachment of *cash* inventory proceeds.⁴² The elimination of the mysterious proceeds reference in old section 9-203(1)(b)⁴³ means that proceeds no longer need be claimed specifically in the security agreement. The controversy concerning whether payments under an insurance policy which insured collateral are "proceeds" has been resolved in the affirmative under new section 9-306(1) if the secured party makes certain that either he or the debtor is designated as loss payee under the insurance policy.⁴⁴ Section 9-306(2) attempts to codify a significant body of case law holding that the security interest does not attach to proceeds if the "disposition" was "authorized."⁴⁵ The changes in *filing requirements* concerning proceeds are significant, but are treated in this article in Part XI.⁴⁶

VIII. FIXTURES

As a general rule, Article 9 deals only with personal property. The most notable exception to this rule involves fixtures. Section 9-313 addresses conflicting priorities arising under real estate law and Article 9 with respect to what Comment 3 to the 1972 Official Text identifies as "an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved."⁴⁷ The

⁴⁰*Id.* § 26-1-9-203(3).

⁴¹*Id.* § 26-1-9-306.

⁴²*Id.* § 26-1-9-312(2) and (3).

⁴³The mystery concerned why old § 9-203(1)(b) seemed to imply the need to grant a security interest in proceeds. The UCC-1 official form should be modified to eliminate the proceeds box. It is unclear whether continued use of the existing form and the absence of a checkmark in the proceeds box imply that the parties had agreed proceeds were not within the security interest they had created. Even if this *were* their agreement, it might not be controlling. See IND. CODE § 26-1-9-203(1)(b) (Supp. 1985).

⁴⁴*Id.* § 26-1-9-306(1).

⁴⁵In *Anon v. Production Credit Association of Scottsburg*, 446 N.E.2d 656 (Ind. Ct. App. 1983), the court held that a secured creditor which allowed the debtor to sell hogs upon condition that the debtor remit the proceeds of sale thereby allowed its security interest in the hogs to be cut off by the sale. The cases are summarized well in *Moffat County State Bank v. Producers Livestock Marketing Association*, 598 F. Supp. 1562 (D. Col. 1984). Much of the controversy in this area originated with *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967). In *Clovis*, the court concluded that a bank which held a security interest in a debtor's cattle and later consented to a sale of the cattle lost its security interest.

⁴⁶See *infra* notes 77-94 and accompanying text.

⁴⁷IND. CODE § 26-1-9-313 (Supp. 1985). See U.C.C. § 9-313 comment 3.

compromise reached in the 1972 Official Text between these competing positions was that if a secured party sought priority only over those claiming security interests or liens in personalty,⁴⁸ he could perfect by filing under the normal chattel filing rules. On the other hand, if he sought priority over those claiming interests under real estate law, he would have to file under a new procedure called "fixture filing."⁴⁹ Such a filing, accomplished under section 9-402(5), must identify the collateral, contain a description of the real estate that would suffice for local recording purposes, and *recite* that it is to be filed in the real estate records.⁵⁰ It must also identify the record owner if other than the debtor.⁵¹ Conversely, the recordation of a real estate mortgage that satisfies these requirements (and describes the goods by item or type) "is effective as a financing statement" under section 9-402(6).⁵²

The priority rules dealing with fixtures are difficult to summarize; indeed, they are difficult to understand. Certain guidelines can be offered:

1. State law determines what constitutes a fixture.⁵³
2. An encumbrance upon fixtures can be created under real estate law.⁵⁴
3. Unless some exception applies, fixture security interests are subordinate to conflicting real estate interests.⁵⁵
4. If a fixture secured party has priority over owners and encumbrancers of the underlying real estate, he may remove his collateral but must pay for actual damage caused by the removal.⁵⁶
5. A construction mortgagee has priority over a fixture filing made at any time before completion of construction so long as the mortgage was recorded before the goods became fixtures, absent the mortgagee's waiver.⁵⁷
6. A purchase money security interest in a fixture arising before and perfected within ten days after affixation prevails over the conflicting interest of the real estate owner and encumbrancers *other than construction mortgagees*.⁵⁸

⁴⁸Examples of such secured parties include lien creditors, those who have consented to the security interest, and those who allowed (or permitted others to allow) one who installed a chattel to remove it.

⁴⁹The new term "fixture filing" is defined in amended § 9-313(1)(b).

⁵⁰IND. CODE § 26-1-9-402(5) (Supp. 1985).

⁵¹*Id.*

⁵²*Id.* § 26-1-9-402(6).

⁵³*Id.* § 26-1-9-313(1)(l).

⁵⁴*Id.* § 26-1-9-313(3).

⁵⁵*Id.* § 26-1-9-313(7).

⁵⁶*Id.* § 26-1-9-313(4)(a), (6).

⁵⁷*Id.* § 26-1-9-313(6).

⁵⁸*Id.* § 26-1-9-313(4)(a), (6).

Obviously, the real estate construction industry has improved its position very effectively in its continuing battle with fixtures claimants. The only way to attain priority over a construction mortgagee is to perfect before the mortgage is recorded. It is important to note, however, the unusual requirement in section 9-313(1)(c) that the construction mortgage not only secure an obligation incurred for the acquisition of land or the construction of an improvement on land, but also *that the recorded instrument indicate* the existence of such an obligation.⁵⁹ Real estate practitioners and mortgage lenders must be sure to supply such a provision in construction mortgage instruments.

There are two ways to accomplish a fixture filing. One is by recording a mortgage that contains an adequate description of the collateral by item or type.⁶⁰ Otherwise, a fixture filing requires: (1) a filing that contains the normal financing statement information and is conducted at the same location at which a mortgage on affected real estate would be recorded,⁶¹ and (2) a showing that it covers fixtures, a recital that it is to be filed for record in the real estate records,⁶² a description of the real estate, and, if the debtor has no interest in the affected real estate, an identification of the record owner.⁶³

IX. CONSIGNMENTS AND LEASES

One of the most serious discrepancies between commercial practice and the UCC concerned consignment sales to merchants. Consignors delivered, and even litigated, in the firm belief that the goods they consigned to merchants still belonged to them. Unfortunately, the UCC

⁵⁹*Id.* § 26-1-9-313(1)(c). Exceptions to these general priority rules are enumerated in IND. CODE § 26-1-9-313(4) and (5) (Supp. 1985). These exceptions to the general priority scheme of § 9-313 are removable factory and office machines and certain domestic appliances (§ 9-313(4)(c)), the lien of the bankruptcy trustee (§ 9-313(4)(d)), the effect of written consent or disclaimer by the rival party (§ 9-313(5)(a)), and the consequence of a debtor having a right to remove the goods, as, for example, under a lease between a tenant and the owner of the real estate (§ 9-313(5)(b)). In each case those who fit within one of these exceptions will prevail over the conflicting interest of an owner or encumbrancer. Regarding the § 9-313(5)(b) exception, if the right arises under a lease of the underlying real estate, and the mortgagee is not a party to a lease which is not recorded, it is unclear whether the mortgagee falls within the exception.

⁶⁰*Id.* § 26-1-9-402(6).

⁶¹*Id.* §§ 26-1-9-313(1)(b), 26-1-9-402.

⁶²The distinction between "recorded" in § 9-402(6)(d) and "filed in the estate records" in § 9-402(6)(c) suggests that fixture filings need not be acknowledged or recorded, but that the recorder must key or index the fixture filings to the recorded information. If this is true, however, there does not appear to be any need for § 9-402(9) to disclaim the applicability of IND. CODE § 36-2-11-15 (1982), under which the preparer of a recorded instrument must be identified. IND. CODE § 26-1-9-412(6), (9) (Supp. 1985).

⁶³The description must be sufficient, if contained in a mortgage, to give constructive notice of the mortgage to third parties. *Id.* § 26-1-9-402(5) (Supp. 1985).

provided in section 2-326 that such goods, regardless of the owner, were subject to the claims of the merchant's creditors and bankruptcy trustee absent a filing.⁶⁴

More confusing was the question of whether the consignor of inventory owed existing inventory secured parties the kind of notice which a purchase money inventory supplier was required to give under section 9-312(3), or whether the consignor would receive the priority promised by this subsection *if* he gave such a notice. The result of this confusion was the creation of a new section⁶⁵ which requires filing *and* notice but provides for the *true* consignor the same priority status a *secured transaction* consignor would receive.⁶⁶ It also validates the consignor's section 9-312(3) notice.⁶⁷

An analogous problem existed for lessors of equipment. The UCC's definitional section for determining what constitutes a true lease and whether the lease was intended as security⁶⁸ invited difficult judgments in specific situations. Lessors were reluctant to concede (by making a UCC filing) that they were not true lessors, and that they might have foreclosure responsibilities under Article 9, Part V. New section 9-412 *allows* a lessor (or consignor) to file, providing that any such filing shall not, of itself, be a factor in determining whether or not the consignment or lease was intended as security.⁶⁹

X. DEFINITIONAL CHANGES

The main definitional changes are confined to sections 9-105 and 106.⁷⁰ Several significant UCC terms are now defined: "encumbrance," "mortgage," "advance pursuant to commitment," and "transmitting utility." The term "account" is *redefined* to include the contents of the abolished term "contract right."⁷¹ Under amended section 9-106, an account means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, *whether or not it has been earned by performance*.⁷² The newly added concept of "advance pursuant to commitment" has produced not only a definition⁷³ but also substantive changes in sections 9-301(4),

⁶⁴See IND. CODE § 26-1-2-326 (1982).

⁶⁵IND. CODE § 26-1-9-114 (Supp. 1985).

⁶⁶*Id.* § 26-1-9-114.

⁶⁷See *id.* § 26-1-9-114(1).

⁶⁸*Id.* § 26-1-1-201(37) (1982).

⁶⁹*Id.* § 26-1-9-412 (Supp. 1985).

⁷⁰*Id.* §§ 26-1-9-105, -106.

⁷¹*Id.* § 26-1-9-106.

⁷²*Id.*

⁷³*Id.* § 26-1-9-105(k).

307(3) and 312(7).⁷⁴ As previously noted in Part VI,⁷⁵ the phrase “pursuant to a commitment” is surprisingly loosely defined to the advantage of the “committed” lender. The newly important term “construction mortgage” is defined in section 9-313(1)(c).⁷⁶

XI. FILING CHANGES

Section 9-401(1)(b) expands the number of items requiring filing in the office where a real estate mortgage would be filed to include not only fixtures, but also timber to be cut and minerals (including oil and gas) and the resulting accounts.⁷⁷ Section 9-401(5) calls for a filing in the office of the Secretary of State by a transmitting utility both as to fixtures *and non-fixtures*.⁷⁸ This filing serves as a fixture filing under section 9-313.⁷⁹ It is uncertain whether titled (“certificated”) vehicles owned by the utility also require a lien notation on the title certificate because of section 9-302(3)(b) or whether this generalized filing by a transmitting utility in the office of the Secretary of State will suffice.⁸⁰

Section 9-402, dealing with formal requirements of a financing statement, offers a number of changes.⁸¹ The following are the most significant:

1. the requirement that the secured party sign the statement⁸²—Because the secured party need not sign the security agreement, there appeared to be no public policy served by requiring him to join the debtor in signing the financing statement which was ancillary to that security agreement.
2. permission for a secured party to file a copy of the financing statement if the original so provides, or is filed in Indiana⁸³
3. permission to file a statement signed only by the secured party when the debtor moves or enters the state or changes his name or when a statement lapses⁸⁴
4. clarification that a partnership name *shall* be used and a trade name *may* also be used⁸⁵

⁷⁴See *id.* §§ 26-1-9-301(4), -307(3), -312(7).

⁷⁵See *supra* note 31 and accompanying text.

⁷⁶IND. CODE § 26-1-9-313(1)(a) (Supp. 1985).

⁷⁷*Id.* § 26-1-9-401(1)(b).

⁷⁸*Id.* § 26-1-9-401(5).

⁷⁹*Id.* § 26-1-9-313.

⁸⁰See *id.* § 26-1-9-302(3)(6).

⁸¹*Id.* § 26-1-9-402.

⁸²*Id.* § 26-1-9-402(1).

⁸³*Id.*

⁸⁴*Id.* § 26-1-9-402(2).

⁸⁵*Id.* § 26-1-9-402(7).

5. the requirement of a new filing within four months after the debtor's name change or corporate restructuring⁸⁶—This change gently lessens the significant policing burden on the collective shoulders of the secured lending fraternity.

Section 9-403 eliminates the sixty-day grace period for financing statement renewals,⁸⁷ extends the perfection period throughout the duration of an insolvency proceeding,⁸⁸ prescribes preservation duties and options for filing officers,⁸⁹ and omits the five-year maturity for transmitting utilities and for real estate mortgages filed as financing statements.⁹⁰ The discussion in Part VIII concerning the newly created fixture filing system under section 9-402(5) need not be repeated here.⁹¹ Section 9-404 imposes the duty to file appropriate termination statements upon written demand, regardless of demand in the case of consumer goods.⁹²

Section 9-306(3)(a) deletes the reference to a financing statement covering proceeds but adds the onerous requirement that the financing statement be filed *where* the proceeds collateral would have required a filing had it been original rather than second generation collateral, and the even more onerous requirement that if the proceeds are acquired with cash proceeds the statement must describe *all types* of potential proceeds.⁹³ This naturally raises the question of how the secured party can know his debtor's *reinvestment* plans when the *original* loan or purchase is being negotiated.⁹⁴

XII. EXCEPTIONS TO THE GENERAL FILING REQUIREMENTS

Section 9-302 sets out the general filing requirement for secured transactions and then lists various exceptions. The most far-reaching is

⁸⁶*Id.*

⁸⁷*Id.* § 26-1-9-403(3). Practitioners are accustomed to attributing an effective life of five years and two months to financing statements because of the language of former § 9-403(2). They must adjust their tickler files after January 1, 1986.

⁸⁸*Id.* § 26-1-9-403(2). It is uncertain what would happen if the bankruptcy court modified the automatic stay so that the secured party may foreclose, or if the bankruptcy court authorized an abandonment of the collateral. Surely the eventual termination of the bankruptcy becomes an irrelevancy at such a point.

⁸⁹*Id.* § 26-1-9-403(3), (4).

⁹⁰*Id.* § 26-1-9-403(5).

⁹¹*See supra* notes 49-52 and accompanying text.

⁹²IND. CODE § 26-1-9-404 (Supp. 1985).

⁹³*Id.* § 26-1-9-306(3)(a).

⁹⁴For example, assume that a lender finances a home computer system used by a housewife in her rural tax return business and perfects by filing with the Secretary of State. If this debtor trades the computer for a farm tractor which her husband, a farmer, needs after January 1, 1986, the tractor, although proceeds from the sale of the computer, would not be automatically perfected because tractors in the hands of a farmer require a local filing in the county of the farmer's residence. In addition, if the computer were

the new omnibus exception in section 9-302(3)(a) which includes unidentified national (and international) registration or filing systems and unidentified federal statutes which specify a different place of filing than would be proper under Article 9.⁹⁵ Three other new exceptions may prove significant. Under section 9-302(1)(c), the assignment of a beneficial interest in a trust is excluded.⁹⁶ It is unclear whether this exception covers *all* assignments, including collateral assignments for security purposes.⁹⁷ Farm lenders will note with interest that "secret liens" on farm equipment costing no more than five hundred dollars are no longer excused from filing.⁹⁸ The unusual treatment of transmitting utilities under section 9-401(5) has already been mentioned in Part XI.⁹⁹

XIII. DEFAULT

Changes in Part Five of Article 9 are surprisingly few. The most significant change concerns a post-default waiver of notice. Under section 9-504(3), as amended, the defaulting debtor may renounce or modify his right to receive notice of a proposed foreclosure sale.¹⁰⁰ The fact that this was not already the law is quite possibly the greatest single misunderstanding maintained by the financing industry and by its customers.

Regardless of whether such a post-default waiver is signed by the debtor, the foreclosing secured party must send notice of sale¹⁰¹ to "any other secured party from whom the secured party has received . . . written notice of a claim of an interest in the collateral."¹⁰² In contrast, under the former language of section 9-504(3), the foreclosing secured party had to send notice of sale to ". . . any other person who has a security interest in the collateral and *who has duly filed* a financing statement indexed in the name of the debtor in this state *or who is known by the secured party to have a security interest in the collateral*."¹⁰³ An automatic entitlement to notice through the mere fact of filing a financing statement was a significant protection to other secured creditors

sold for cash and the cash were used to purchase a piano, the original filing would be ineffective as to the proceeds because the original financing statement, although filed in the correct office, did not describe these proceeds by type as required under amended § 26-1-9-306(3)(1).

⁹⁵See IND. CODE § 26-1-9-302(1)(c) (Supp. 1985).

⁹⁶*Id.* § 26-1-9-302(1)(c).

⁹⁷Time will tell, of course, but it would make no sense to exclude from the filing requirements a particular type of collateral (the beneficial interest under a trust) when the basic premise of Article 9 was to invalidate secret consensual liens.

⁹⁸IND. CODE § 26-1-9-302(1)(c) (Supp. 1985).

⁹⁹See *supra* notes 78-80 and accompanying text.

¹⁰⁰IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰¹In consumer goods cases *no* other notification need be given.

¹⁰²IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰³*Id.* § 26-1-9-504(3) (1982) (emphasis added).

against a “give-away” sale of their common collateral. This amendment to subsection (3) has made one significant change and preserved one significant problem. The problem arises out of the last sixteen words of this requirement emphasized in the above quotation. There is a question whether the regional credit manager of a national corporation is likely to know whether someone employed by his giant employer was once told about a possible rival security interest. Without this knowledge, it is doubtful that he can fulfill this notice requirement. The significant change arises out of the substitution of written notice by other claimants for the prior recognition that the filed financing statement itself was sufficient notice of their interest in being notified of any proposed sale.¹⁰⁴

It seems reasonably clear under amended section 9-504(3) that, while a debtor after default can waive his right to notification of sale, he cannot waive his right to the sale itself.¹⁰⁵ Also, it appears that he cannot waive his right that the sale be commercially reasonable.¹⁰⁶

Section 9-505(2) has been amended to provide a defaulting debtor with a *comparable* right to renounce his ability to resist the secured party's retention of collateral. The amendment also imposes a comparable restriction on the foreclosing creditor's notification duties.¹⁰⁷ The axiom that comparability has its limits finds expression in this “comparable” right. A debtor under section 9-504(3) waives notice of the disposition but not his right to the disposition itself.¹⁰⁸ The section 9-505(2) debtor may be able to waive both.¹⁰⁹

¹⁰⁴Surely all who have duly filed financing statements describing the collateral in question are entitled to notice. There is no reason to restrict notice of the pending sale to those who have sent the foreclosing party a written notice of rival claim, timely received. The words “received” and “written notice” strongly suggest that the rival's mere perfection by filing will not suffice as the requisite written notice. It almost appears necessary for each secured party to *mail* copies of his filed financing statement to all others he discovers when he files. If such action is necessary, it is unclear what he must do about those who file after he does. Curiously, the new, and soon to be controversial, wording imposes no limit on the *duration* of the written notice. The Code does not indicate whether the purchase money notification sent pursuant to § 9-312(3) will suffice if the proposed sale is by some other secured party who received a copy of that notice almost five years before. A heavy policing burden has been placed on each secured creditor: the burden of attempting to notify all rival secured parties of the obvious fact that he (or it) would like to be notified of any disposition of the common collateral.

¹⁰⁵IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰⁶Much case law has now accumulated concerning how much public notice is necessary to make the “public sale” a fair one and the corresponding publicity a secured party need provide for a private sale. For a discussion of various issues arising under this section, see Quinn, *Uniform Commercial Code Commentary and Law Digest* 9-321 and 59-405 (1978 & Supp. I 1985).

¹⁰⁷IND. CODE § 26-1-9-505(2) (Supp. 1985).

¹⁰⁸*Id.* § 26-1-9-504(3).

¹⁰⁹IND. CODE § 26-1-9-505(2). The critical wording in amended § 9-505(2) is “if he has not signed, after default, a statement renouncing or modifying his rights under this

XIV. MISCELLANEOUS

Section 2-702, which governs the seller's right to cancel a credit sale to an insolvent, has received a boost in effectiveness by the deletion in section 2-702(3) of the words "or lien creditor."¹¹⁰ Under former section 2-702(3), the seller's right to reclaim is "subject to the rights of a buyer in ordinary course or other good faith purchaser *or lien creditor*."¹¹¹ The most prevalent lien creditor today is the trustee in bankruptcy (or a Chapter 11 debtor-in-possession). This change should significantly reduce the scope of the exception to the credit seller's cancellation capacity. The elimination of "contract right" as a concept has required the term "account" to be redefined in the present *and* future tense, i.e., amounts due or *to become* due.¹¹² Fine tuning under section 9-318(4), which deals with the assignment of accounts, correspondingly broadens the coverage to include amounts not yet fully earned by performance.¹¹³ This subsection does attempt to end the account debtor practice of barring assignments indirectly by requiring the account debtor's consent.

XV. THE PRESERVATION OF INDIANA VARIATIONS

As a whole, Indiana's heterodox variations have been preserved under the 1985 amendments to the UCC. The following provisions represent continuing departures from the 1972 Official Text:

1. Indiana's most significant departure from the uniform act is probably to be found in section 9-307(1), dealing with buyers of encumbered goods in the ordinary course of business. This exception is preserved.¹¹⁴
2. Section 9-402(2)(c) allows a secured party to file a financing statement signed only by the secured party if so authorized by the debtor in the security agreement. This provision has survived the amendments.¹¹⁵
3. The "secret lien" on farm machinery under section 9-307(2) had a

subsection." Arguably, the debtor's right to resist retention of collateral as a substitute for foreclosure through sale is a right granted to the debtor under this subsection separate from his right to receive notice of the secured parties' proposal. Note also the convoluted wording of § 9-501(3).

Id. § 26-1-9-501(3).

¹¹⁰*Id.* § 26-1-2-702(3) (Supp. 1985).

¹¹¹*Id.* (emphasis added).

¹¹²See *id.* § 26-1-9-106. See also *supra* notes 71-72 and accompanying text.

¹¹³IND. CODE § 26-1-9-318(4) (Supp. 1985).

¹¹⁴*Id.* § 26-1-9-307(1).

¹¹⁵*Id.* § 26-1-9-402(2)(c).

\$500 rather than a \$2,500 maximum.¹¹⁶ Farm equipment has been removed from the subsection entirely.¹¹⁷

4. Section 9-312(4) provided a fifteen-day rather than a ten-day period within which to perfect a purchase money security interest. The fifteen-day period is preserved.¹¹⁸

XVI. TRANSITION PERIOD

Sections 42 through 47 of Senate Enrolled Act No. 108 adopt most of Article 11. The effective date is January 1, 1986.¹¹⁹ While prior transactions under the Act remain valid and perfected after January 1, 1986, they will thereafter be subject to the new Act for purposes of termination, enforcement, and the like.¹²⁰ As an example of how this abstract statement is transformed into a particular application, consider the matter of after-acquired collateral. Under new section 11-105(2), after-acquired property which would have attached as late as December 31, 1985, pursuant to an old act security interest, will not attach on or after January 1, 1986, unless the perfection filing was consistent with new Act requirements.¹²¹ Under new section 11-105(1), the sixty-day grace period for renewing financing statements after the five-year duration has expired will not be available after January 1, 1986.¹²² Note also the December 31, 1988 deadline in section 11-106,¹²³ and the July 1, 1986 "springing fixture filings" provision under section 11-105(4).¹²⁴

XVII. CONCLUSION

This short article can do little more than identify the most significant changes in the UCC made by the 104th General Assembly. Future authors, it is hoped, will focus in depth on these changes to offer guidance to the courts. Article 9 was by far the most innovative of the nine

¹¹⁶See *id.* § 26-1-9-307(2) (1982).

¹¹⁷*Id.* § 26-1-9-307(2) (Supp. 1985).

¹¹⁸*Id.* § 26-1-9-312(4).

¹¹⁹The effective date and transition provisions of Public Law 93-1985, by which the 1972 amendments to the U.C.C. were adopted, are not considered a part of the Official Code.

¹²⁰The UCC approach under which old act transactions become subject to the new act for purposes of termination, enforcement, and the like is quite unlike the bankruptcy statutes which establish that pending bankruptcy cases filed before October 1, 1979, are still being conducted under the superseded "Bankruptcy Act" rather than the current Bankruptcy Code.

¹²¹Pub. Law No. 93-1985, Senate Enrolled Act 108, § 44(2).

¹²²*Id.* § 44(1).

¹²³*Id.* § 45(1), (2).

¹²⁴*Id.* § 44(4).

articles comprising the UCC when it was originally proposed in the early 1950's. The 1962 Official Text (Indiana's former statute) served the public quite well over the years, but the accumulated experience of the various states revealed various problem areas, particularly in Article 9. The 1972 Official Text reflected the combined efforts of the National Conference of Commissioners on Uniform State Laws and the American Law Institute to update Article 9, with incidental amendments to other articles only when necessary for the sake of consistency. Because all major commercial states, most of Indiana's neighbors, and over four-fifths of all American jurisdictions have now adopted the 1972 Official Text, Indiana's adoption of this text is most welcome. This article ends with a *caveat*: the general public and the typical commercial enterprise will assume that nothing of consequence flows from this "rewriting" of an existing statute. The responsibility rests with the practitioners and house counsel to analyze these changes in the context of each particular enterprise and make such changes in forms and procedures as the circumstances warrant. Those who fail to do so will be left behind.

Senate Enrolled Act No. 1: A New Era of Banking Expansion in Indiana

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In its 1985 session, the Indiana General Assembly passed, and on April 18, 1985, the Governor of Indiana signed into law, Senate Enrolled Act No. 1 of 1985¹ (hereinafter the "Act") to reform Indiana banking law. The adoption of this Act promises to usher Indiana banks and bank holding companies into a new era of banking and bank expansion. The Act was divided into five major sections, each offering new opportunities for Indiana banks: (1) bankers' banks,² (2) intra-county branching,³ (3) cross-county branching,⁴ (4) multi-bank holding companies,⁵ and (5) regional bank holding companies.⁶ In addition, it included an unusual provision which permitted banks and bank holding companies to choose whether or not to participate in bank expansion activities.

First, this Article will summarize those five provisions and the opt-out portion of the Act and examine certain controversial issues related to the Act that have arisen since its passage. Second, this Article will examine the federal response to regional reciprocity. Finally, it will conclude with a discussion of the reciprocity problems posed by the Act.

I. ANALYSIS OF THE INDIANA ACT

A. *Bankers' Banks*

As a result of the Act, both state and national banks located in Indiana can participate as shareholders in state chartered "bankers' banks,"⁷ subject to the approval of the Indiana Department of Financial Institutions (hereinafter the "DFI").⁸ A bankers' bank must be owned exclusively by other banks⁹ and be organized solely for the purpose of

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¹Pub. L. No. 265, 1985 Ind. Acts 1.

²IND. CODE § 28-1-11-4(e) (Supp. 1985).

³*Id.* § 28-2-13-19.

⁴*Id.* § 28-2-13-20.

⁵*Id.* §§ 28-2-14-10 to -13.

⁶*Id.* §§ 28-2-15-16 to -20, -26.

⁷IND. CODE § 28-1-11-4(e) (Supp. 1985).

⁸*Id.* § 28-1-4-7.

⁹*Id.* § 28-1-11-4(e)(1).

providing services to other banks and their officers, directors, and employees.¹⁰ The formation of these entities permits banks to engage in collective operations, and thus affords small and medium-sized banks economies of scale and provides an opportunity to render services in a larger geographic area. By limiting each bank's investment in a bankers' bank to no more than ten percent of the investing bank's capital and surplus, and by limiting each bank's ownership to no more than five percent of any class of voting securities of the bankers' bank, the Act closely parallels limitations imposed upon national banks under federal law.¹¹

B. Intra-County Branch Banking

The Act repealed Indiana's long-standing restrictive branching laws for state banks, substituting new provisions governing intra-county branching¹² and authorizing, for the first time, branching across county lines.¹³ With written approval of the DFI,¹⁴ and subject to the limitations upon total deposits set forth below, a state bank is now allowed to establish¹⁵ or acquire, for each \$200,000 of capital and surplus, a branch bank anywhere in the county of its principal office.¹⁶

Branches cannot be acquired, however, if, as a result of the acquisition, the acquiring bank¹⁷ and its Indiana affiliates¹⁸ will hold a percentage of total deposits in all Indiana banks larger than ten percent prior to July 1, 1986; eleven percent after June 30, 1986 but prior to July 1, 1987; and twelve percent after June 30, 1987.¹⁹ The Act defines "deposits" as the sum of total demand deposits and total time and

¹⁰*Id.* § 28-1-11-4(e)(2).

¹¹*Compare* IND. CODE § 28-1-11-4(e) (Supp. 1985) with 12 U.S.C. § 24 (Supp. 1985).

¹²IND. CODE § 28-2-13-19 (Supp. 1985).

¹³*Id.* § 28-2-13-20. *See infra* notes 22-42 and accompanying text.

¹⁴Before the DFI approves an application for an intra-county branch, "it shall determine to its satisfaction that (1) the public convenience and advantage will be served and promoted by the establishment of a branch in the location of the proposed branch; and (2) the applicant state bank has satisfied the capital and surplus requirement specified. . . ." *Id.* § 28-2-13-19(b).

¹⁵A branch established by means other than by acquisition is referred to as a "branch de novo." The Indiana Code defines "branch de novo" as a branch established by the opening of a new branch and includes, with some exceptions, a branch acquired from another bank without acquiring substantially all of the assets of the other bank. *Id.* § 28-2-13-9.

¹⁶*Id.* § 28-2-13-19. This section contains virtually all of the operative intra-county branching provisions.

¹⁷*See id.* § 28-2-13-2 for a definition of "acquiring bank."

¹⁸*See id.* § 28-2-13-3 for a definition of "affiliate," and § 28-2-13-16, which defines "Indiana affiliate." Both provisions focus on the ownership of two separate banks by the same bank holding company.

¹⁹*Id.* § 28-2-13-19(d)-(e).

savings deposits of a particular bank as shown in its consolidated report of condition as of December 31, 1984.²⁰ For purposes of applying the deposit limitation, "deposits" are to be determined by reference to the acquiring bank's most recently filed consolidated report of condition in the possession of the appropriate regulatory agency.²¹

C. Cross-County Branch Banking

The Act also authorizes limited cross-county branching by permitting a state bank²² and, by application of federal law,²³ a national bank to establish branches either *de novo*²⁴ or by acquisition²⁵ in counties contiguous²⁶ to the county of its principal office.²⁷ The establishment of cross-county branches is subject to several limitations, which will be referred to as: (1) the "Percentage-of-Deposits Limitation";²⁸ (2) the "Five-Year Existence and Continuous Operation Limitation";²⁹ (3) the "Once-Per-Period Limitation";³⁰ and (4) the "First Bank Limitation."³¹

The Percentage-of-Deposits Limitation provides that the establishment of a branch by acquisition in contiguous counties will not be permitted if, after the acquisition, the acquiring bank and its Indiana affiliates will have a percentage of all Indiana deposits greater than the percentages allowed in intra-county branching.³²

The Five-Year Existence and Continuous Operation Limitation precludes the establishment of a branch by acquisition if either the acquiring bank or the acquired bank has not been in existence and continuously operated as a bank for more than five years.³³ This requirement is met if a bank was formed from a consolidation of banks each of which

²⁰*Id.* § 28-2-13-14.

²¹*Id.* § 28-2-13-19(d).

²²*Id.* § 28-2-13-18, which defines "state bank" as a bank that has been organized or reorganized under Indiana law.

²³12 U.S.C. § 36(c) (1982). This provision authorizes national banks to establish and operate branch banks in the same manner and to the same extent that state banks are so authorized. Thus, the Indiana Act may be viewed as applying to both state and federally chartered banks.

²⁴*See supra* note 15.

²⁵*See* IND. CODE § 28-2-13-8 (Supp. 1985), which defines a "branch by acquisition" as a branch acquired by merger, consolidation, or purchase of all or substantially all of its assets by the acquiring bank.

²⁶*Id.* § 28-2-13-11.

²⁷*Id.* § 28-2-13-20.

²⁸*Id.* § 28-2-13-20(c).

²⁹*Id.* § 28-2-13-20(d).

³⁰*Id.* § 28-2-13-20(g).

³¹*Id.* § 28-2-13-20(i)(2).

³²*Id.* § 28-2-13-20(c); *see also supra* note 19 and accompanying text.

³³*See id.* § 28-2-13-20(d).

satisfies the five-year requirement³⁴ or if the bank was a "phantom" bank that survived a merger with a bank which satisfies the five-year requirement.³⁵ Although these two exceptions to this limitation are sensible, one consequence of the entire requirement is that, if literally read, it would require a new bank less than five years old that formed a one-bank holding company by merging into a phantom bank to wait an additional five years after the merger to qualify for cross-county branching.

The Once-Per-Period Limitation establishes a five-year period, beginning July 1, 1985, and ending June 30, 1990, during which the number of branches a bank can establish de novo or by acquisition outside its home county is limited.³⁶ The limitations based on the total deposits of the bank including its Indiana affiliates are as follows: (1) Banks with deposits³⁷ of \$200,000,000 or less can establish one out-of-county branch per year,³⁸ (2) banks with deposits greater than \$200,000,000 but not greater than \$400,000,000 can establish one out-of-county branch in each twenty-four month period ending June 30, 1987, and June 30, 1989, and another branch in the twelve month period ending June 30, 1990,³⁹ and (3) banks with deposits exceeding \$400,000,000 can establish one out-of-county branch in each thirty-month period ending December 31, 1987, and June 30, 1990.⁴⁰ Following any cross-county acquisition, the total deposits of the acquiring and acquired banks, including their affiliates, will be combined to determine the category into which the acquiring bank will fall for purposes of the Once-Per-Period Limitation.⁴¹ Under this provision, banks can lay the groundwork for acquiring future branches by making noncontrolling investments in target institutions with arrangements to consummate the acquisition at the beginning of the next available "period."

The First Bank Limitation provides that, until June 30, 1990, only the *first* Indiana bank controlled by a bank holding company is permitted to establish out-of-county branches.⁴² If a bank holding company simultaneously gains control of more than one bank during that period, then the bank that first established an out-of-county branch will be the only one to have cross-county branching rights.

The First Bank Limitation could create a problem for individuals who because of their stock ownership in a certain bank or bank holding

³⁴IND. CODE § 28-2-13-20(d)(1) (Supp. 1985).

³⁵*Id.* § 28-2-13-20(d)(2).

³⁶*Id.* § 28-2-13-20(g).

³⁷Deposits are defined as of December 31, 1984. *Id.* § 28-2-13-14.

³⁸*Id.* § 28-2-13-20(g)(1).

³⁹*Id.* § 28-2-13-20(g)(2).

⁴⁰*Id.* § 28-2-13-20(g)(3).

⁴¹*Id.* § 28-2-13-20(h).

⁴²*Id.* § 28-2-13-20(i)(2).

company are deemed to "control" that entity.⁴³ Depending on how the limitation and certain related definitions are interpreted, the growth opportunity for banks "controlled" by such individuals could be severely restricted.

As previously noted, the First Bank Limitation states that "[a]mong affiliates, the only bank that has branching rights under this section is the first Indiana bank *controlled* by the bank holding company. . . ."⁴⁴ Several definitions must be reviewed to understand fully the potential consequences of this provision to "controlling" shareholders. Under the Act, "control" means:

[D]irectly or indirectly (1) to own, control, or hold, with power to vote, twenty-five percent or more of the voting shares of a bank or *company*; (2) to control in any manner the election of a majority of the directors or trustees of a bank or company; or (3) to exercise controlling influence over the management or policies of a bank or company. . . ."⁴⁵

"Bank holding company" is defined as "any *company* that has or acquires control over: (1) any bank; or (2) any company that has or acquires control over any bank,"⁴⁶ subject to certain exceptions provided under the statute. "Company" means "any corporation, partnership, joint-stock company, business trust, voting trust, *joint venture*, *association*, or *similar organization*, domestic or foreign."⁴⁷ The possibility of a group being characterized as a company depends largely upon how "joint venture" and "association" are defined. If those terms are defined broadly, it is possible that a group of persons that owns or controls the stock of several banks or bank holding companies might be deemed to constitute a company, and consequently, a bank holding company for purposes of enforcing the First Bank Limitation. In that event, only the *first* bank controlled by the group would have branching rights.⁴⁸

Two Indiana cases focus on the definition of "joint venture." In both *State ex rel. Uebelhor v. Armstrong*⁴⁹ and *Kochert v. Wiseman*,⁵⁰ the courts concluded that the collaborative actions of the respective groups caused them to be characterized as joint ventures for purposes of the Indiana Bank Holding Company Act.⁵¹ In *Uebelhor*, a group of individuals came together to buy part of the outstanding stock of a

⁴³*Id.* § 28-2-13-12.

⁴⁴*Id.* § 28-2-13-20(h)(2) (emphasis added).

⁴⁵*Id.* § 28-2-13-12 (emphasis added).

⁴⁶*Id.* § 28-2-13-6 (emphasis added).

⁴⁷*Id.* § 28-1-13-10 (emphasis added).

⁴⁸*See id.* § 28-2-14-20.

⁴⁹252 Ind. 351, 248 N.E.2d 32 (1969).

⁵⁰148 Ind. App. 613, 269 N.E.2d 12 (1971).

⁵¹IND. CODE §§ 28-8-2-1 to -4 (1982).

target bank. They jointly borrowed \$160,000 to purchase the stock and then divided the stock up among the group. The group held a number of meetings to discuss how to divide the stock and appointed a treasurer who opened a special checking account for the group. The court held that, given the circumstances, a joint venture did exist.⁵²

In *Kochert*, a group of individuals took action to purchase voting control of a target bank. The court held that the existence of a profit motive and the division of the acquired stock among the group, as well as the filing of a joint application with the Indiana Department of Financial Institutions requesting permission to acquire voting control of the targeted bank, constituted sufficient evidence of concerted activity.⁵³ However, because the factual record could be decided either way, the court remanded the case to determine whether the group was acting as a joint venture.⁵⁴

In both cases, the courts closely scrutinized the existence of facts and circumstances which demonstrated concerted actions on the part of each group and their apparent intent to act as a group. A group of shareholders that controls two or more banks or bank holding companies should, therefore, focus on the extent to which its members' actions in acquiring control reflect actions taken in concert with one another pursuant to a group plan.

Indiana case law fails to provide a definition of the term "association" in a context that is relevant to a group's control of a bank for purposes of enforcing the First Bank Limitation. However, a Federal Reserve Board Ruling under Regulation Y⁵⁵ of the Federal Reserve Regulations provides some assistance in defining that term. This ruling generally requires the presence of a formalized or structured relationship among individuals, evidenced by agreement of some kind, before an "association" will be found to exist.⁵⁶

In summary, in light of the definitions discussed above, any group that owns or plans to acquire control of several banks should examine carefully the extent to which they risk being characterized as a joint venture or association. In the event they are characterized as such, they will be deemed to be a company within the provisions of the Act. Consequently, only the first bank controlled by the group will be deemed to have cross-county branching rights.

The Act also includes a provision that "grandfathers" previously established out-of-county branches of an acquired bank by allowing such

⁵²252 Ind. at 358, 248 N.E.2d at 36.

⁵³148 Ind. App. at 625, 269 N.E.2d at 17-18.

⁵⁴*Id.* at 626, 269 N.E.2d at 20.

⁵⁵12 C.F.R. § 225 (1985).

⁵⁶"Company" - *Individual Shareholders Not Constituting "Association,"* FED. BANKING L. REP. (CCH) No. 4-420, at ¶ 33258 (Sept. 13, 1977).

branches to remain in operation in their current location,⁵⁷ and it also exempts acquisitions of troubled banks⁵⁸ from the above four limitations.⁵⁹ However, the growth in deposits resulting from any such acquisition will be considered in connection with future branching by acquisition.⁶⁰ Finally, the Act permits state banks⁶¹ to establish automated teller machines at any location in the state, provided notice is given to the DFI prior to establishing or relocating any such machine.⁶²

D. Indiana Multi-Bank Holding Companies

Under the Act, a bank holding company⁶³ with its principal office in Indiana is for the first time permitted to control two or more banks or bank holding companies,⁶⁴ subject to the Percentage of Deposits Limitation⁶⁵ and the Five-Year Existence and Continuous Operation Limitation.⁶⁶ The Percentage of Deposits Limitation provides that the acquisition by an Indiana bank holding company of an Indiana bank or Indiana bank holding company is not permitted if all Indiana banks within the holding company group will control more than the maximum allowable percentage of deposits for a given period.⁶⁷ These percentages per period are the same as those applied to intra-country and cross-county branches.⁶⁸ In addition, under the Five-Year and Continuous Operation Limitation, an acquisition by an Indiana bank holding company of another bank or bank holding company is not permitted if the target bank or a bank subsidiary of the target bank holding company has not been in "existence and continuously operated" for five or more years.⁶⁹

If a company⁷⁰ or bank holding company desires to acquire control⁷¹ of another bank or bank holding company, it is required to file an

⁵⁷*Id.* 28-2-13-20(f). An out-of-county branch is one located in a county that is not in the county in which the principal office of the acquiring bank is located or contiguous to the county in which the principal office of the acquiring bank is located. *Id.*

⁵⁸*Id.* § 28-1-7.2-3(i).

⁵⁹See *supra* notes 28-31 and accompanying text.

⁶⁰IND. CODE § 28-2-13-21 (Supp. 1985).

⁶¹By application of federal law, national banks are also permitted to establish automated teller machines. See *supra* note 23.

⁶²IND. CODE § 28-2-13-22 (Supp. 1985).

⁶³*Id.* § 28-2-14-3.

⁶⁴*Id.* § 28-2-14-10.

⁶⁵*Id.* § 28-2-14-11(a)-(b).

⁶⁶*Id.* § 28-2-14-11(c).

⁶⁷*Id.* § 28-2-14-11(a)-(b).

⁶⁸See *supra* notes 19, 32 and accompanying text.

⁶⁹IND. CODE § 28-2-14-11(c) (Supp. 1985).

⁷⁰*Id.* § 28-2-14-5.

⁷¹*Id.* § 28-2-14-6.

application for approval with the DFI.⁷² As part of its application, an applicant can request that the DFI hold a "fairness hearing" on the terms and conditions of the proposed transaction.⁷³ Such a hearing is available only if the DFI in its discretion⁷⁴ decides to grant the hearing and if the consideration given in the transaction includes "stock" issued by the acquiring company.⁷⁵ Accordingly, a fairness hearing may not be available for a transaction that involves debt or "hybrid" securities such as convertible debentures. If the DFI conducts a fairness hearing *and* rules favorably, the acquiring company can qualify for an exemption⁷⁶ from the registration requirements of the Federal Securities Act of 1933⁷⁷ and the Indiana Securities Act.⁷⁸

The use of a fairness hearing to gain an exemption from securities registration requirements, although not uncommon in routine corporate transactions, is of questionable utility in multi-bank holding company transactions. The possible complexities of multi-bank holding company transactions can involve the DFI in lengthy administrative hearings, possibly culminating in litigation. In short, in many cases, it may be more advantageous for the applicant and the DFI to leave the resolution of fairness questions to the application of various disclosure requirements of the securities laws and other mechanisms available under general corporate law.

E. The Opt-Out Provision and the Business Judgment Rule

A provision unique to the Act permitted a board of directors⁷⁹ of an Indiana bank or bank holding company to adopt resolutions prior to July 1, 1985, which exempted the institution from the regional bank holding company or the multi-bank holding company provisions of the

⁷²The DFI application must be accepted by the DFI for processing within ten days of receipt, assuming it is informationally sufficient as filed. The DFI is then required to review the proposed acquisition for compliance with the Percentage of Deposits and Five-Year Existence and Continuous Operation Limitations and to investigate the condition of the applicant and the party to be acquired. The DFI, at its option, can hold public hearings on the proposed acquisition at any time after thirty days following the acceptance of the application. The DFI is required to approve or disapprove the application within either (1) forty-five days after acceptance of the application (if the DFI elects not to hold a public hearing on the application) or (2) thirty days after a public hearing is held. See IND. CODE § 28-2-14-12 (Supp. 1985).

⁷³IND. CODE § 28-2-14-13 (Supp. 1985).

⁷⁴The existence of the DFI's discretion is inferred by the use of permissive language in IND. CODE § 28-2-14-13(a).

⁷⁵*Id.* § 28-2-14-13(a).

⁷⁶*Id.* § 28-2-14-13(c).

⁷⁷Securities Act of 1933, § 77(f), 15 U.S.C. § 77 (1982).

⁷⁸IND. CODE § 23-2-1-3 (1982).

⁷⁹Pub. L. No. 265, 1985 Ind. Acts 37, § 9(a).

Act until July 1, 1987.⁸⁰ The adoption and filing of the latter resolution also precluded the bank from cross-county branching by acquisition until July 1, 1987.⁸¹ However, the bank is still permitted to establish *de novo* branches on a cross-county basis.⁸²

Because of the unusual nature of this opt-out provision, it is far from clear at this writing what its overall import will be. Among other implications, it raises the questions of whether a board of directors properly exercises its fiduciary duties when by its action or inaction its institution participates or fails to participate in banking expansion. The existence of the option also raises the question (at least until the expiration of the "opt-out" period on July 1, 1987) whether the laws of other states that *do not* include similar opt-out provisions will be deemed to be "reciprocal" by the respective state regulators for the purpose of regional banking expansion.⁸³

The extent to which a board of directors exercises its duty of care in determining whether or not to opt out of regional or regional and state bank expansion activity remains to be tested in the Indiana courts. Such litigation might arise where an otherwise desired or profitable disposition of stock is precluded by a board's previous decision to opt out of expansion activity or, conversely, where a board's decision to participate in bank expansion produces unwanted or unprofitable takeovers or costly efforts to resist unwanted takeover attempts. As courts begin to address this issue, they should carefully scrutinize a director's actions and apply the protection of the business judgment rule to the director's decisions.

Although the business judgment rule has not yet been codified in Indiana nor adopted by Indiana courts, statutory duties of due care and loyalty do exist.⁸⁴ In addition, the Indiana courts have applied general concepts of fiduciary duty to a director's decisions which affect the general well being of the corporation.⁸⁵ Courts generally presume that a director exercises due care when making decisions in good faith,⁸⁶ regardless of whether the courts analyze the case under the business judgment rule, concepts of fiduciary duty, or statutes similar to both.

⁸⁰*Id.* § 9(b)-(c).

⁸¹*Id.* § 9(c).

⁸²*Id.* "This subsection does not apply to the establishment of a branch *de novo* under IC 28-2-13 or IC 28-6-2.1, whichever is applicable."

⁸³See *infra* notes 146-77 and accompanying text.

⁸⁴IND. CODE § 23-1-2-11 (Supp. 1985).

⁸⁵*Yerke v. Batman*, 176 Ind. App. 672, 376 N.E.2d 1211 (1978); *Epperly v. E. & P. Brake Bonding, Inc.*, 169 Ind. App. 224, 348 N.E.2d 75 (1976); *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 157 Ind. App. 546, 301 N.E.2d 240 (1973).

⁸⁶See, e.g., *Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

The plaintiff has the burden of rebutting this presumption by establishing that a director's decisions were guided by improper motives.⁸⁷ Unfortunately, given the unique nature of the "opt-out" provision, the Indiana audience has little authority by which to predict the manner in which this standard will be applied or the outcome of any such application. However, some guidance can be found in case law dealing with corporate control contests.

In control contest cases, the issue is often raised of whether a director who advocates anti-takeover measures, which serve a function very similar to the opt-out provisions, has acted in good faith. Although a director's interest in retaining control nearly always operates in control contests, most courts have retained the traditional presumption in favor of the action of the director, unless the director's primary purpose in adopting the anti-takeover measure was self-interest.⁸⁸ In fact, where an anti-takeover attempt has proven adverse to the corporation's interest, a director has had an affirmative duty to resist it.⁸⁹ Nevertheless, at least one court has held that the mere presence of self-interest shifts the burden to the director to show that his actions are fair and reasonable to the bank or bank holding company.⁹⁰ If Indiana courts follow this authority, they will presume that a director who voted to opt out of regional or regional and state expansion exercised due care *unless* evidence is presented that the director's primary motive for opting out was self-interest. In applying this presumption, regardless of whether or not a decision to opt out of expansion activity was made, the procedure by which a board of directors made their decision and the extent to which they documented the decision-making process, especially those considerations in favor of the final determination, will become most critical.

To establish that self-interest *was not* its primary motivation, a board will be expected to demonstrate its objectivity in reaching its decision. This objectivity can be demonstrated in several ways. For example, the delegation of the opt-out decision to a committee of outside directors will heighten the presumption of objectivity in favor of the directors.⁹¹ The employment of independent advisors such as accountants, investment advisors, and attorneys to help evaluate the bank or bank holding company's best interests will also benefit the board of directors.⁹² Most

⁸⁷See *infra* note 88.

⁸⁸See, e.g., *Treco, Inc. v. Land of Lincoln Savings & Loan*, 749 F.2d 374 (7th Cir. 1984); *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Johnson v. Trueblood*, 629 F.2d 287 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

⁸⁹*Treco, Inc. v. Land of Lincoln Savings & Loan*, 749 F.2d at 378.

⁹⁰*Heit v. Baird*, 567 F.2d 1157 (1st Cir. 1977).

⁹¹*Panter v. Marshall Field & Co.*, 646 F.2d at 294.

⁹²*Id.*

important, however, will be the extent to which the board has carefully documented the facts and reasoning underlying the decision to opt out or to opt in. The board should retain detailed minutes of the meetings at which these decisions were considered.

A recent Delaware Supreme Court decision⁹³ provides an alarming example of what can result from a board of directors' failure to adhere to any form of procedure before or during its deliberations and to document completely the actual decision-making process. In *Smith v. Van Gorkom*, the board of directors of Trans Union Corporation, consisting of five inside directors and five sophisticated outside directors, approved a merger transaction that on its face presented very favorable terms to Trans Union's shareholders.⁹⁴ The board's decision to approve the proposed cash-out merger occurred at a meeting where the majority of the directors and counsel had had no notice of the matter to be considered. Additionally, there was no written summary of the terms of the merger or other documentation to support the adequacy of the sale price-per-share which had been offered and accepted. The directors conducted no discussion of the method by which the proposed sale price-per-share had been obtained. Rather, they acted entirely in reliance upon a summary presentation by Trans Union's chairman and chief executive officer.

The Delaware Supreme Court held that Trans Union board had failed to exercise its duty of care in that it lacked valuation information adequate to reach an informed business decision with respect to the fairness of the price offered.⁹⁵ Although the fifty-five dollar price-per-share agreed upon appeared to be a "good deal," and despite the lack of evidence of self-dealing or self-interest, the simple fact remained that the board failed to make an informed decision. Thus, the court stated that the protection of the business judgment rule was not available.⁹⁶ In its decision, the court indicated that boards of directors must act carefully, methodically, deliberately, and cautiously to be certain that their decision will later receive the protection of the business judgment rule.

To summarize, it is likely that Indiana courts will presume that a board of directors acted with due care when deciding whether to opt out or participate in banking expansion in the absence of evidence of self-dealing and acting primarily in the board's own self-interest. In addition, if the recent Delaware case is evidence of any trend, an uninformed decision, even in a favorable transaction, might result in the refusal by a court to adhere to the business judgment rule. Although

⁹³*Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

⁹⁴*Id.* at 869.

⁹⁵*Id.* at 893.

⁹⁶*Id.* at 872.

a board of directors can do little about its decision now, it should keep these principles in mind as it considers opportunities to acquire and to be acquired by other banks and bank holding companies.

F. Regional Bank Holding Companies

Subject to the DFI's approval, the Act permits a regional bank holding company to acquire one or more Indiana banks or Indiana bank holding companies,⁹⁷ commencing January 1, 1986.⁹⁸ This legislation defines a regional bank holding company as a bank holding company, other than an Indiana bank holding company, that

(1) has its principal place of business in Ohio, Kentucky, Illinois or Michigan;

(2) has more than eighty percent (80%) of the total deposits of its bank subsidiaries held by regional banks located within the region (which includes Indiana, Ohio, Kentucky, Illinois or Michigan); and

(3) is not controlled by a bank holding company other than a regional bank holding company.⁹⁹

This last requirement is designed to prevent the ultimate control of Indiana banks by bank holding companies located outside the five state region. The acquisition of an Indiana bank¹⁰⁰ or Indiana bank holding company¹⁰¹ by a regional bank holding company is subject to the "Percentage-of-Deposits Limitation"¹⁰² and the "Five-Year Existence and Continuous Operation Limitation."¹⁰³ With the exception of the Percentage-Of-Deposits Limitation, the above limitations applicable to regional bank holding companies do not apply to the merger of a troubled bank or savings bank with a qualified banking institution.¹⁰⁴

If a regional bank holding company that has obtained control of Indiana institutions ceases to be a regional bank holding company as a result of acquiring a bank in another state that is not contiguous to Indiana, it will be required within two years to divest itself of all Indiana banks and Indiana bank holding companies, subject to certain narrow and technical exceptions.¹⁰⁵

⁹⁷IND. CODE § 28-2-15-17 (Supp. 1985).

⁹⁸Pub. L. No. 265, 1985 Ind. Acts 38, § 10.

⁹⁹IND. CODE § 28-2-15-16 (Supp. 1985).

¹⁰⁰*Id.* § 28-2-15-10.

¹⁰¹*Id.* § 28-2-15-11.

¹⁰²*Id.* § 28-2-15-18(a)-(b).

¹⁰³*Id.* § 28-2-15-18(c).

¹⁰⁴*Id.* § 28-2-15-18(d).

¹⁰⁵*Id.* § 28-2-15-22(b).

The Act also contains a reciprocity provision that must be met before a regional bank holding company is entitled to acquire an Indiana bank or an Indiana bank holding company.¹⁰⁶ This provision states that the laws of the state in which the regional bank holding company has its principal place of business must permit Indiana bank holding companies to acquire banks and bank holding companies in that state.¹⁰⁷ Additionally, the laws of the state in which the regional bank holding company has its principal place of business must permit the regional bank holding company to be acquired by the Indiana bank holding company or bank sought to be acquired.¹⁰⁸

Before acquiring an Indiana bank or bank holding company, a regional bank holding company must file an application for approval with the DFI.¹⁰⁹ The DFI will conduct the same type of investigation that it would conduct with an Indiana multi-bank holding company application.¹¹⁰ In addition, the applicant can request a "fairness hearing"¹¹¹ on the terms and conditions of the proposed transaction, thus raising the possibility of an exemption from securities laws registration requirements.¹¹²

Interestingly, the Act contains a somewhat unusual severability clause that would automatically eliminate the regional holding company provisions of the Act in the event a court authorizes the acquisition of an Indiana institution by an out-of-state, nonregional bank or bank holding company.¹¹³ The theory of this provision appears to be that, without such a clause, the reciprocity limitation could be declared unconstitutional, thus exposing Indiana banks to acquisitions by bank holding companies from any state in the nation. This severability clause prevents the Act from becoming a multi-bank holding company bill without reciprocity. Given the recent Supreme Court decision in *Northeast Bancorp v. Board of Governors*,¹¹⁴ however, the likelihood of Indiana's needing to rely on this severability provision to protect portions of the Act is small. The Court in *Northeast Bancorp* upheld regional reciprocity legislation against constitutional attack.¹¹⁵

¹⁰⁶*Id.* § 28-2-15-18(e).

¹⁰⁷*Id.* § 28-2-15-18(e)(1).

¹⁰⁸*Id.* § 28-2-15-18(e)(2).

¹⁰⁹*Id.* § 28-2-15-19.

¹¹⁰*Id.* See also *supra* note 72.

¹¹¹IND. CODE § 28-2-15-20 (Supp. 1985).

¹¹²*Id.* The applicant could be exempted from Indiana registration requirements under IND. CODE § 23-2-1-3 (1982) and from federal registration requirements under the Securities Act of 1933, § 77(f), 15 U.S.C. § 77 (1982).

¹¹³IND. CODE § 28-2-15-26.

¹¹⁴105 S. Ct. 2545 (1985).

¹¹⁵*Id.*

II. THE FEDERAL RESPONSE TO REGIONAL BANKING

Until recently, states have been reluctant to open their doors to out-of-state banking organizations. Congress has acquiesced to the states' wishes by passing the Douglas Amendment,¹¹⁶ which ties the geographic expansion of national banks and bank holding companies to that expansion permitted state-chartered banks and bank holding companies under state law. The Douglas Amendment to the Bank Holding Company Act of 1956 prohibits bank holding companies from acquiring out-of-state subsidiary banks unless the law of the state where the subsidiary bank is located expressly allows the acquisition.¹¹⁷

In the past few years, however, many states have adopted legislation allowing reciprocal regional expansion, thereby creating networks of de facto banking regions. Massachusetts,¹¹⁸ Connecticut,¹¹⁹ Rhode Island¹²⁰ and Maine,¹²¹ for example, comprise part of a New England banking region, and North Carolina,¹²² South Carolina,¹²³ Georgia,¹²⁴ and Florida¹²⁵ comprise part of a southern region. These statutes allow banking organizations from specified states to acquire in-state banking organizations, provided that the target's state law allows similar acquisition privileges to banking organizations in the acquirer's state.

A. *The Northeast Bancorp Case*

Prior to June 10, 1985, much speculation existed as to the constitutionality of regional banking statutes and as to whether the United States Supreme Court or the United States Congress would be the first to address the regional reciprocity issue. On June 10, 1985, the Supreme Court upheld the constitutionality of regional reciprocity legislation in *Northeast Bancorp v. Board of Governors*.¹²⁶ In that case, three bank holding companies, New England Corporation, Hartford National Corporation, and Bank of Boston Corporation, had received approval from the Board of Governors of the Federal Reserve System to acquire out-

¹¹⁶12 U.S.C. § 1842(d) (1982). Congress has also acquiesced in the states' wishes in the McFadden Act, 12 U.S.C. § 36(c) (1982), which limits the branching rights of national banks to those permitted state-chartered banks in the state where the national bank has its principal office.

¹¹⁷12 U.S.C. § 1842(d) (1982).

¹¹⁸MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1984).

¹¹⁹CONN. GEN. STAT. ANN. §§ 36-552 to -563 (West Supp. 1985).

¹²⁰R.I. GEN. LAWS § 19-30-1 (Supp. 1984).

¹²¹ME. REV. STAT. ANN. tit. 9B, §§ 1011-1019 (1980 & Supp. 1985).

¹²²N.C. GEN. STAT. §§ 53-209 to -218 (Supp. 1985).

¹²³S.C. CODE ANN. §§ 34-24-10 to -100 (Supp. 1984).

¹²⁴GA. CODE §§ 7-1-620 to -625 (Supp. 1985).

¹²⁵FLA. STAT. § 658.295 (1984).

¹²⁶105 S. Ct. 2545 (1985). The decision was unanimous (8-0). Justice Powell did not participate.

of-state banking institutions pursuant to the regional reciprocity statutes of Massachusetts and Connecticut. Northeast Bancorp, Inc., Union Trust Company, and Citicorp opposed those acquisitions and appealed the Board's ruling, arguing that the Douglas Amendment did not authorize state regional reciprocity legislation and that such legislation violated the Commerce Clause,¹²⁷ the Compact Clause,¹²⁸ and the Equal Protection Clause¹²⁹ of the United States Constitution.

Justice Rehnquist, writing for the Court, first engaged in an extensive analysis of the legislative history of the Douglas Amendment. He concluded that the Massachusetts and Connecticut statutes, which allow acquisition of in-state banking organizations only by bank holding companies from states in the New England region, serve well the policy underlying the Douglas Amendment of preserving local control over banking.¹³⁰

Secondly, Justice Rehnquist addressed the petitioners' argument that regional banking statutes burden the flow of interstate commerce between regional and nonregional states. "There can be little dispute," he wrote, "that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject."¹³¹ Congress had not remained silent, however, because it had enacted the Douglas Amendment. Justice Rehnquist thereby implied that, by tying interstate expansion of bank holding companies to state law, Congress specifically authorized states to limit the flow of banking commerce across their borders and, therefore, made regional banking statutes invulnerable to Commerce Clause attacks.

Justice Rehnquist next addressed the petitioners' challenge that the Massachusetts and Connecticut statutes constitute a compact in violation of the Compact Clause. Even though legislators in Massachusetts and Connecticut collaborated in promoting the acts at issue and the two acts resemble each other by imposing reciprocity and a regional limitation, Justice Rehnquist found the "classic indicia" of a compact to be absent.¹³² He noted that the states did not form a body to establish or regulate regional banking, that they did not condition their actions upon that of the other states nor restrict the other states' ability to modify or repeal their laws, and that they did not make the regional limitation a requirement of reciprocity.¹³³ A statute that contained such "classic

¹²⁷U.S. CONST. art. I, § 8, cl. 3.

¹²⁸*Id.* art. I, § 10, cl. 3.

¹²⁹*Id.* amend. XIV, § 1.

¹³⁰105 S. Ct. at 2553.

¹³¹*Id.* at 2553-54.

¹³²*Id.* at 2554.

¹³³*Id.*

indicia," in other words, would satisfy the definition of a compact, but the Massachusetts and Connecticut statutes did not do so. Even if the two statutes had created a compact, however, the Court found that such a compact is not forbidden by the Compact Clause.¹³⁴ Only those agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States" violate the Compact Clause.¹³⁵ Such an effect, Justice Rehnquist wrote, does not exist in regional banking, particularly in light of the Douglas Amendment.¹³⁶

Finally, the Court addressed the petitioners' argument that regional banking statutes violate the Equal Protection Clause. Applying the rational basis test, the Court admitted that such statutes discriminate between regional and nonregional states but found a rational basis for the discrimination.¹³⁷ Justice Rehnquist emphasized the fact that "our country traditionally has favored widely dispersed control of banking,"¹³⁸ as indicated by the typically local ownership of commercial banks. Because regional statutes preserve this tradition by allowing growth while retaining relatively local control of banking, Justice Rehnquist concluded that a rational basis exists for distinguishing between regional and nonregional states.¹³⁹ In her concurrence, Justice O'Connor, without granting tradition the same importance, agreed with Justice Rehnquist that the need exists for close ties between banks and communities.¹⁴⁰ In addition, she pointed out the "longstanding doctrine" which provides that the "Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are—in ways relevant to the proper goals of the State."¹⁴¹ In other words, regional banks better serve state needs than do nonregional banks.

B. The House Banking Bill

Just two days after the Supreme Court's decision in *Northeast Bancorp*, the House Banking Committee approved a bill¹⁴² providing a trigger for nationwide banking. The bill would force states with regional banking statutes to allow acquisition by bank or thrift holding companies from nonregional states on July 1, 1990, or two years after the effective

¹³⁴*Id.*

¹³⁵*Id.* (quoting *Virginia v. Tennessee*, 148 U.S. 503 (1893)).

¹³⁶105 S. Ct. at 2554.

¹³⁷*Id.* at 2555-56.

¹³⁸*Id.* at 2555.

¹³⁹*Id.* at 2556.

¹⁴⁰*Id.* (O'Connor, J., concurring).

¹⁴¹*Id.* at 2557.

¹⁴²H.R. 2707, 99th Cong., 1st Sess. (1985).

date of the regional statute, whichever is later.¹⁴³ States could retain their reciprocity requirements under the bill, however, and could even escape the national trigger altogether by repealing their regional statutes, provided that no regional acquisition had occurred pursuant to them.¹⁴⁴ The imminent enactment of such a national trigger appears unlikely, but an eventual response by Congress to regional banking seems inevitable.

Indiana regional banking, then, no longer runs the risk of being held unconstitutional, but it nevertheless could be profoundly affected by Congress' future response to *Northeast Bancorp.* If Congress adopts the bill as approved by the House Banking Committee, Indiana would be forced to allow acquisitions by nonregional holding companies, except for the severability clause of the Act.¹⁴⁵ That clause invalidates the provision allowing regional bank holding companies to acquire Indiana banks and bank holding companies if an Indiana or federal court construes the statute to allow the acquisition of Indiana banks and bank holding companies by nonregional bank holding companies. Thus, Indiana's regional banking provision would be effectively repealed, and as long as no regional acquisition had occurred pursuant to Indiana's law, Indiana would effectively escape the national trigger.

III. RECIPROCITY PROBLEMS POSED BY THE REGIONAL BANK HOLDING COMPANY PROVISION OF THE INDIANA ACT

The regional bank holding company provision of the Act permits a regional bank holding company, defined as a company with its principal place of business in Ohio, Kentucky, Illinois, or Michigan, to acquire one or more Indiana banks or bank holding companies if various requirements are met.¹⁴⁶ Among those requirements is a mandate that two reciprocity tests be satisfied.¹⁴⁷ First, the law of the acquirer's state must permit Indiana bank holding companies to acquire banks and bank holding companies located in the acquirer's state.¹⁴⁸ Second, the acquirer's state law must allow the target, if it were a bank holding company attempting to do so, to acquire the acquirer.¹⁴⁹ In addition, the Indiana Act requires the DFI to subject the acquisition by a regional holding company to any requirements that would apply to the acquisition of a bank holding company in the acquirer's state.¹⁵⁰

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵IND. CODE § 28-2-15-26 (Supp. 1985). See *supra* notes 113-15 and accompanying text.

¹⁴⁶IND. CODE § 28-2-15-16 (Supp. 1985).

¹⁴⁷*Id.* § 28-2-15-18(e).

¹⁴⁸*Id.* § 28-2-15-18(e)(1).

¹⁴⁹*Id.* § 28-2-15-18(e)(2).

¹⁵⁰*Id.* § 28-2-15-19(f).

In order to determine whether reciprocity exists between two states, an examination must be made of the reciprocity tests provided by both statutes. If one of the states fails the other's test, then no reciprocity exists. Because this subject is so new and unexplored, predicting how banking authorities and courts will interpret and apply the reciprocity provisions is nearly impossible. Those bodies should remain cognizant in making their decision that the legislatures of Indiana, Ohio, and Kentucky in enacting their regional banking provisions believed that they were introducing regional banking to their states and desired to do so. To defeat that desire should require a clear failure of reciprocity.

Of the five states that the Indiana Act specifies as belonging to Indiana's region,¹⁵¹ only Ohio¹⁵² and Kentucky¹⁵³ have enacted regional banking statutes. Michigan will probably enact a regional banking statute in the future. The future of regional banking in Illinois is less certain. The following discussion reviews the Ohio and Kentucky regional banking provisions and discusses the likelihood of finding reciprocity between Indiana and the above states.¹⁵⁴

A. Reciprocity with Ohio

The Indiana Act, if myopically applied, would not pass the Ohio reciprocity test. If reasonably applied with due regard for legislative intent, however, the Indiana Act should pass the Ohio reciprocity test. Such an application would ensure a ruling that the Ohio Act passes the Indiana reciprocity test.

The Ohio law¹⁵⁵ provides that a bank holding company with its principal place of business in states contiguous to Ohio as well as in Delaware, the District of Columbia, Illinois, Maryland, Missouri, New Jersey, Tennessee, Virginia, and Wisconsin may acquire a bank or bank holding company in Ohio, provided that the Superintendent of Banks "in his discretion" determines that the law of the acquirer's home state would permit an Ohio bank or bank holding company to acquire a bank or bank holding company in the acquirer's state on "terms that, on the whole, are substantially no more restrictive than those established under [the Ohio Act]."¹⁵⁶ After three years, the Ohio Act extends to all states in the nation that can satisfy this reciprocity test.¹⁵⁷

¹⁵¹*Id.* § 28-2-15-14.

¹⁵²House Bill No. 102, 1985 Ohio Laws 1 (to be codified as amended at OHIO REV. CODE ANN. §§ 1101.05-051).

¹⁵³KY. REV. STAT. §§ 287.900-.990 (Supp. 1985).

¹⁵⁴Prior to the publication of this Article, both Michigan and Illinois passed bills providing for regional banking with reciprocity provisions.

¹⁵⁵House Bill No. 102, 1985 Ohio Laws 1.

¹⁵⁶*Id.* at 2, § 1 (to be codified as amended at OHIO REV. CODE ANN. § 1101.05(B)).

¹⁵⁷*Id.*

Unlike the Indiana Act, the Ohio Act also allows regional banks, as opposed to bank holding companies, to establish operations in Ohio by entry *de novo* as well as by acquisition so long as the target's state offers a reciprocal method of entry.¹⁵⁸ In other words, the Ohio Act would allow an Indiana bank holding company to establish as well as acquire a bank subsidiary in Ohio if the Indiana Act allowed the same method of entry for Ohio bank holding companies. Indiana does not, however, allow entry *de novo*, only entry by acquisition.¹⁵⁹

The Indiana Act also places other limitations on regional acquisitions not found in the Ohio Act. The Indiana Act places the following three limitations on acquisitions by regional bank holding companies of Indiana banks and bank holding companies. First, immediately following the acquisition, the regional bank holding company cannot control more than ten percent of the total deposits in Indiana banks until July 1, 1986; eleven percent from July 1, 1986 through June 30, 1987; and twelve percent after June 30, 1987.¹⁶⁰ Second, either the Indiana target or its bank subsidiaries must have existed for five years.¹⁶¹ Third, more than twenty percent of the deposits held by the acquirer's bank subsidiaries cannot be located outside of the region both at the time of the acquisition and thereafter.¹⁶² Ohio's sole restriction is that, immediately after the acquisition, the acquirer of an Ohio bank or bank holding company cannot control over twenty percent of the total deposits held by all banks and thrifts in Ohio.¹⁶³ Thus, an Indiana bank holding company could acquire a percentage of deposits in Ohio (twenty percent of deposits in both banks and thrifts) that is more than twice the percentage of deposits that an Ohio bank holding company could acquire in Indiana (ten percent to twelve percent of deposits in just banks). Moreover, the Ohio law does not require that the target have been in existence for five years, nor does it require that a bank or bank holding company with its principal place of business in the region maintain any percentage of its deposits in the region. The latter "anti-leap-frogging" provision under the Indiana Act could significantly restrict the expansion of out-of-state bank holding companies into Indiana's region.¹⁶⁴

¹⁵⁸*Id.*

¹⁵⁹*See supra* notes 97-115 and accompanying text.

¹⁶⁰IND. CODE § 28-2-15-18(b).

¹⁶¹*Id.* § 28-2-15-18(c). This section contains special provisions for determining whether the five years have elapsed for banks which are products of consolidation and for phantom banks created solely to facilitate acquisitions.

¹⁶²*Id.* § 28-2-15-11.

¹⁶³House Bill No. 102 1985 Ohio Laws at 4, § 1 (to be codified as amended at OHIO REV. CODE ANN. § 1101.05(E)).

¹⁶⁴By requiring a bank with its principal place of business in Indiana's five state region to maintain more than eighty percent of its total deposits of its bank subsidiaries

In spite of the above differences, the Ohio Superintendent of Banks should find that the Indiana Act and the Ohio Act are reciprocal in that Indiana's provisions "are substantially no more restrictive than those established under [the Ohio Act]."¹⁶⁵ Both acts allow regional bank holding companies to acquire in-state institutions with few limitations. The limitations that do exist under the two Acts are similar, though not identical, both restricting the percentage of deposits held by an out-of-state institution.

The similarity of the Ohio and Indiana Acts is further evident when contrasted with the Illinois statute. The Illinois statute¹⁶⁶ provides that out-of-state bank holding companies may acquire Illinois institutions only if they are failing. As such, it is not expansive enough to promote regional banking or to afford many out-of-state bank holding companies significant opportunities to expand into Illinois.

The Indiana and Ohio Acts, however, do promote regional banking and do afford significant opportunities for expansion into their respective states. The regulatory agencies and the courts that will decide whether the Indiana and Ohio Acts are reciprocal, therefore, should honor legislative intent and refrain from interfering with regional banking expansion. If the Ohio Superintendent of Banks refuses to approve acquisitions of Ohio banks and bank holding companies by Indiana bank holding companies, and the courts affirm that decision on appeal by holding that Indiana's Act is substantially more restrictive than Ohio's Act, then the Ohio Act will fail the first requirement of Indiana's reciprocity test. That test states that the law of the acquirer's state must permit Indiana bank holding companies to acquire banks and bank holding companies located in the acquirer's state.¹⁶⁷ Absent such a ruling, however, the Ohio Act would pass the Indiana reciprocity test.

Assuming that the Indiana Act is not ruled unreciprocal to the Ohio Act, the Ohio Act satisfies the first requirement of the Indiana reciprocity test because the Ohio Act specifically provides that Indiana bank holding companies may acquire Ohio banks and bank holding companies.¹⁶⁸ Additionally, the second requirement of the Indiana reciprocity test, which requires that the particular Indiana target at issue be permitted to acquire the particular Ohio bank holding company at issue, would probably be met. In practical terms, the Ohio requirement that out-of-state bank holding companies possess no more than twenty percent of the total deposits in Ohio banks and thrifts would allow virtually all

within the region, Indiana's Act effectively precludes an out of state bank from "leap-frogging" into Indiana's region.

¹⁶⁵See *supra* note 156 and accompanying text.

¹⁶⁶ILL. ANN. STAT. ch. 17, § 2510 (Smith-Hurd Supp. 1984).

¹⁶⁷IND. CODE § 28-2-15-18(e) (Supp. 1985).

¹⁶⁸See *supra* note 156 and accompanying text.

acquisitions of Ohio banks and bank holding companies by Indiana banks and bank holding companies. In summary, in light of the legislative intent of both Indiana and Ohio to promote regional banking expansion, reviewing bodies should determine that the Acts are reciprocal.

B. Reciprocity with Kentucky

The Kentucky reciprocity test is essentially the same as the Ohio reciprocity test. The Kentucky Act¹⁶⁹ provides that a bank holding company with its principal place of business in a contiguous state may acquire control over a Kentucky bank or bank holding company, provided that the acquirer's state law allows the acquisition of an in-state bank or bank holding company by a Kentucky bank holding company "under conditions substantially no more restrictive" than those imposed under the Kentucky Act.¹⁷⁰ Like the Ohio Act, the Kentucky Act extends this provision to nonregional states after two years.¹⁷¹

The Kentucky Act contains three basic limitations. First, a bank holding company may not acquire control over a Kentucky bank or bank holding company if, immediately thereafter, it would control banks holding over fifteen percent of the deposits in all Kentucky banks.¹⁷² Second, for five years after July 13, 1984, a bank holding company may not acquire control over a Kentucky bank or bank holding company if, immediately thereafter, it would control more than three banks in the state during any twelve-month period.¹⁷³ Third, a bank holding company may not acquire direct or indirect control of a Kentucky bank chartered after July 13, 1984, unless the target bank has been in existence for five years.¹⁷⁴

Although a finding of reciprocity between Indiana and Kentucky is more likely than between Indiana and Ohio, it is not certain. The Kentucky Act allows Indiana bank holding companies to acquire a larger percentage of deposits in Kentucky (fifteen percent of all banks deposits) than the Indiana Act allows Kentucky bank holding companies to acquire in Indiana (ten percent to twelve percent of all bank deposits). The difference between these percentages, however, is arguably offset by the Kentucky Act's limitation of multi-bank holding companies to control of only three Kentucky banks for the first five years that the Act is effective.¹⁷⁵ Indiana lacks a comparable provision. Indiana and Kentucky

¹⁶⁹KY. REV. STAT. §§ 287.900-.990 (Supp. 1984).

¹⁷⁰*Id.* § 287.900(6)(a).

¹⁷¹*Id.* § 287.990(6)(b).

¹⁷²*Id.* § 287.990(3).

¹⁷³*Id.* § 287.990(4).

¹⁷⁴*Id.* § 287.990(2).

¹⁷⁵See *supra* note 173 and accompanying text.

¹⁷⁶See *supra* notes 103, 174 and accompanying text.

also have similar provisions requiring target banks to be in existence five years prior to their acquisition by out-of-state holding companies.¹⁷⁶ Finally, the Indiana Act provides that no more than twenty percent of the deposits held by the acquirer's subsidiaries may even be located outside of the region.¹⁷⁷ This provision may so restrict expansion by Kentucky bank holding companies that it could cause the Indiana Act to fail the Kentucky reciprocity test.

If the Kentucky commissioner determines that the Indiana Act is not reciprocal with the Kentucky Act and that Indiana bank holding companies cannot acquire Kentucky banks and bank holding companies, then the Kentucky law will fail the first requirement of the Indiana reciprocity test. But for that fact, the Kentucky law would pass the Indiana test. The Kentucky Act satisfies the first requirement of the Indiana test by specifying that bank holding companies with their principal places of business in states contiguous to Kentucky may acquire Kentucky banks and bank holding companies. Additionally, the second requirement of the Indiana reciprocity test would probably be met, as in Ohio, in nearly all cases. It is highly unlikely that an acquisition of a Kentucky bank or bank holding company by an Indiana bank would cause the latter to hold over fifteen percent of the deposits in all Kentucky banks. Thus, the Indiana and Kentucky Acts should be deemed to be reciprocal.

It is not altogether clear whether Senate Enrolled Act No. 1 has brought interstate banking to Indiana. The reciprocity provisions of the Indiana, Ohio, and Kentucky Acts remain to be interpreted, initially by state banking officials and then by the courts. Those bodies should recognize that the Indiana, Ohio, and Kentucky Acts are reciprocal in that they are all expansive enough to promote regional banking and to afford significant opportunities for expansion within their defined regions, subject to similar, though not identical, deposit restrictions.

IV. CONCLUSION

Senate Enrolled Act No. 1 has truly ushered in a new era for banking expansion in Indiana by providing for bankers' banks, intra-county branching, cross-county branching, multi-bank holding companies, and regional bank holding companies. The Act has also raised new issues in Indiana law by including an opt-out provision, which permitted the board of directors of an Indiana bank or bank holding company to exempt its institution from various provisions of the Act. This provision raises the issue of whether a director properly exercises his fiduciary duties by exempting or failing to exempt his institution from various bank expansion opportunities. Various other issues, such as whether

¹⁷⁷See *supra* note 99 and accompanying text.

Indiana's Act will be deemed to be reciprocal with the Ohio and Kentucky Acts for the purpose of regional banking expansion, will continue to engage the attention of banks, state regulatory agencies, and the courts.

Finally, the fate of Senate Enrolled Act No. 1 and other acts like it has been and will continue to be affected by the federal response to regional banking. In *Northeast Bancorp v. Board of Governors*,¹⁷⁸ the Supreme Court upheld the constitutionality of regional reciprocity legislation. A House banking committee has also responded to banking expansion by approving a bill that would provide a trigger for nationwide banking. This bill is not likely to win congressional approval, but it is probably a harbinger of future action which will surely affect the implementation of Indiana's Senate Enrolled Act No. 1.

¹⁷⁸105 S. Ct. 2545 (1985).

Insurance Companies and Work Product Immunity Under Indiana Trial Rule 26(B)(3): Indiana Adopts a Fact-Sensitive Approach

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I. INTRODUCTION

In 1985, the Indiana Court of Appeals announced a decision of special significance to insurers and attorneys involved in disputes over insurance claims. Prior to *CIGNA-INA/Aetna v. Hagerman-Shambaugh*,¹ parties to claims disputes confronted a particular discovery question without the benefit of an Indiana case setting forth guidelines for resolving the issue.² The question involves the application of the work product privilege to a situation in which a claimant whose claim has been denied seeks to discover all of the materials compiled by the insurer in the process of making its determination regarding coverage of the claim.³

A person whose claim has been denied may bring an action against the insurer for a bad faith refusal to pay. In order to prove the allegation of bad faith, particularly in light of the high standard for a recovery of punitive damages,⁴ it is crucial for the claimant to gain access to the documents most likely to demonstrate bad faith on the part of the insurer.

*Articles Editor, *Indiana Law Review*.

¹473 N.E.2d 1033 (Ind. Ct. App. 1985) (*trans. denied*, Sept. 20, 1985).

²The *Hagerman* court was quick to point out that *Newton v. Yates*, 170 Ind. App. 486, 353 N.E.2d 485 (1976), involved similar issues but failed to provide any answers.

³Indiana Trial Rule 26(B)(3) states the work product privilege in the following language:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

For an extensive analysis of the issue and the approaches to this discovery problem, see Note, *Work Product Discovery in Insurance Litigation*, 18 IND. L. REV. 547 (1985) [hereinafter cited as Note, *Work Product*].

⁴In *Travelers Indemnity Co. v. Armstrong*, 422 N.E.2d 349 (Ind. 1982), the court restricted the availability of punitive damages by holding that an insured must first demonstrate with clear and convincing evidence that the insurer's conduct was fraudulent, deceitful, or oppressive. This standard has since been codified. See IND. CODE § 34-4-34-2 (Supp. 1985).

At this point, the standard for discovery set forth in Indiana Trial Rule 26(B)(3) becomes applicable. Under this rule, materials prepared in anticipation of litigation have limited immunity from discovery. If a court determines that the insurer prepared the items with the requisite eye toward litigation, the claimant is entitled to discovery only if it can be shown that there is a substantial need for the materials and that the substantial equivalent cannot be obtained absent undue hardship. In addition, if a document was prepared in anticipation of litigation, mental impressions and conclusions contained in the document are absolutely immune from discovery.⁵

A. Policies Behind the Limited Immunity Given to Work Product

These rules stem from two general policies. On the one hand, the discovery process is designed to permit the parties to have access to all potentially significant information to prepare adequately for trial. Conversely, each party is encouraged to compile the materials and develop the strategy supporting the party's position without fear that an opponent will be permitted to gain access to and take advantage of the work. The balancing of these two policies was discussed extensively in *Hickman v. Taylor*,⁶ the landmark Supreme Court case delineating certain restrictions on the discovery of an attorney's work product.

In *Hickman*, the Court determined the extent to which a plaintiff in a tort action could discover statements obtained by the defendant from persons involved in the accident.⁷ Recognizing that public policy supports reasonable and necessary inquiries into files and records prepared by another party, the Court discussed several policy considerations for placing restrictions on discovery. First, written records are necessary to maintain accuracy and efficiency in the litigation process, and attorneys should be encouraged to maintain such materials without fear that strategic information will be disclosed.⁸ In addition, liberal discovery would enable parties to take advantage of the work of others or even encourage some to prepare misleading materials designed to deceive those requesting them.⁹ As a whole, it was clear that unrestrained discovery of work product would have an adverse effect on the interests of clients and the administration of justice.¹⁰ Those policies, now incorporated in Federal Rule of Civil Procedure 26(b)(3),¹¹ are also reflected in Indiana Trial Rule 26(B)(3).

⁵IND. R. TR. P. 26(B)(3).

⁶329 U.S. 495 (1947).

⁷*Id.* at 498, 499.

⁸*Id.* at 511.

⁹The Court referred to such tactics as "sharp practices." *Id.*

¹⁰*Id.*

¹¹See *Upjohn Co. v. United States*, 449 U.S. 382, 398 (1981).

B. Approaches to the Problem

For several years in Indiana, a question remained concerning the balance to be struck between the need for disclosure and the need to protect work product in the context of disputes over insurance coverage. As recognized by the courts, insurers are naturally in the business of anticipating litigation.¹² The uncertainty arises concerning the point at which that anticipation is sufficient to warrant the application of work product immunity.¹³ Approaches to the problem vary. The majority of courts dealing with the problem have taken the position that the expectation of litigation must be such that an attorney has become involved in the dispute and has prepared the documents himself or has requested their preparation.¹⁴ Until such attorney involvement takes place, none of the items is immune from discovery.

A small minority of courts, on the other hand, provide much broader protection to materials prepared by an insurer, holding that all statements and information secured by an insurer after an event which may expose the insurer or its insured to a claim are protected by work product immunity.¹⁵ Such a view emphasizes the litigious nature of our society and holds that an insurer's notice of a potential claim indicates that the "seeds of prospective litigation" have been sown.¹⁶ Courts have been extremely critical of this blanket approach in light of the hardship imposed upon claimants who need more information to prepare their cases adequately.¹⁷

In 1985, Indiana refused to follow either of the two approaches above and instead chose to adopt a third approach which appears to

¹²See *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147, 149 (D. Neb. 1972); *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84, 89 (R.I. 1978).

¹³The courts have different ways of describing the necessary degree of anticipation. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) (must be "some possibility" of litigation); *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga. 1977) (must be a "substantial probability that litigation will occur and that commencement of such litigation is imminent"); *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969) (prospect of litigation must be "identifiable").

¹⁴*McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115 (N.D. Ga. 1972); *Thomas Organ Co. v. Jadranska Plobojna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972); *Henry Enter., Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979).

¹⁵*Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972); *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84 (R.I. 1978).

¹⁶*Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d at 89-90.

¹⁷*Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. at 118; *Thomas Organ Co. v. Jadranska Plobojna Plovidba*, 54 F.R.D. at 373; *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 334, 670 P.2d 725, 732 (1983) (en banc).

be gaining strength among other jurisdictions.¹⁸ Under this analysis, a court considers all of the facts surrounding the preparation of the materials in question. In particular, it is necessary to examine the way in which an insurance company conducts its business and to determine at what point the efforts of the insurer shifted "from mere claim evaluation to a strong anticipation of litigation."¹⁹ This case-by-case approach has been criticized for its inability to provide uniformity in decisions of lower courts,²⁰ but it is unlikely to result in arbitrary determinations and is more consistent with the purposes behind protection given to materials prepared for trial.²¹ Indiana's adoption of this view in *CIGNA-INA/Aetna v. Hagerman-Shambaugh*²² eliminated prior uncertainty regarding discovery of an insurer's documents and established a reliable framework to be used by attorneys and judges in analyzing disputes over insurance coverage.

II. *CIGNA-INA/Aetna v. Hagerman-Shambaugh*

A. *The Facts*

*CIGNA-INA/Aetna v. Hagerman-Shambaugh*²³ arose out of an insurance policy issued on a construction project. Hagerman Construction Company ("Hagerman") installed regulator panels as part of a project to make certain additions on a water pollution control plant. Several of the panels were damaged in a flood, and Hagerman made a claim to CIGNA-INA/Aetna ("CIGNA") for the cost of repairing the damage. CIGNA denied coverage.²⁴

In bringing its action against CIGNA, Hagerman filed a request for production by CIGNA of "[a]ll memoranda, letters, notes or documents of any nature" relating to the claim.²⁵ In objecting to the request, CIGNA argued that production of the materials would be unduly burdensome and a violation of CIGNA's privilege against discovery of work product. In response to this objection, the court permitted CIGNA to submit any documents it believed to be work product to the court for

¹⁸See *State Farm and Casualty Co. v. Perrigan*, 102 F.R.D. 235 (D. Va. 1984); *Klawes v. Firestone Tire & Rubber Co.*, 572 F. Supp. 116 (E.D. Wis. 1983); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 670 P.2d 725 (1983) (en banc). For an in-depth analysis of this approach and its virtues, see Note, *Work Product*, *supra* note 3, at 559-71.

¹⁹*Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982).

²⁰*McAlpine*, 391 A.2d at 89 (citing *Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975)).

²¹*Maricopa County*, 137 Ariz. at 334, 670 P.2d at 732.

²²473 N.E.2d 1033 (Ind. Ct. App. 1985) (*trans. denied*, Sept. 20, 1985).

²³*Id.*

²⁴*Id.* at 1034.

²⁵*Id.*

in camera inspection.²⁶ The day after CIGNA submitted seven documents, the court announced its decision that the items were relevant to Hagerman's claim, unprotected by the attorney-client privilege, and not prepared in anticipation of litigation. In addition, the court concluded that the materials were discoverable despite the fact that they contained conclusions and opinions.²⁷

On CIGNA's interlocutory appeal, the Indiana Court of Appeals affirmed the trial court's decision, taking the opportunity to establish clearer guidelines for the discoverability of materials prepared by insurers in response to claims. The court focused its analysis upon the rules concerning relevancy and work product found in trial rule 26(B)(1) and (3).²⁸ The court first noted that the materials in question were relevant so long as there was a possibility that the information Hagerman sought would be relevant to the claim.²⁹ Trial courts are given a great deal of discretion in questions regarding discovery,³⁰ and the court of appeals could do little more than conclude that the trial court had not reached a clearly erroneous decision.³¹

Next, the court examined the relevancy of the materials to Hagerman's claim for punitive damages based on the theory that CIGNA denied the claim in bad faith. Under a policy of liberal discovery, courts are more likely to conclude that "[t]he information sought will to some degree demonstrate the thoroughness with which [the insurer] investigated and considered [the] plaintiff's claim and thus is relevant to the question of the good or bad faith of [the insurer] in denying the claim."³² CIGNA argued that liberal discovery of an insurer's file whenever a claimant alleged bad faith would discourage insurers from conducting full and open investigations of claims for fear that production of such materials would assist a claimant in proving the allegations of bad faith. In particular, CIGNA was concerned that documents indicating uncertainty regarding coverage would support the claim for punitive damages.³³

In response to this argument, the court emphasized Indiana's commitment to preventing "awards of punitive damages against insurers who in good faith pay only the amount required under the policy."³⁴ The

²⁶*Id.*

²⁷*Id.* at 1035.

²⁸*Id.* at 1036.

²⁹*Id.*

³⁰*Condon v. Patel*, 459 N.E.2d 1205 (Ind. Ct. App. 1984); *Constanzi v. Ryan*, 175 Ind. App. 257, 370 N.E.2d 1333 (1978).

³¹*CIGNA-INA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d at 1036 (Ind. Ct. App. 1985) (trans. denied Sept. 20, 1985).

³²*Id.* (quoting *Atlanta Coca-Cola Bottling*, 61 F.R.D. at 117 (N.D. Ga. 1972)).

³³473 N.E.2d at 1036.

³⁴*Id.* (citing *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d

court went on to hold that expressions of uncertainty as to coverage, if made in good faith, will not provide grounds for an award of punitive damages.³⁵ Insurers are not likely to be discouraged from conducting a full and open investigation because such a failure itself could lead to an inference that the insurer acted in bad faith.³⁶

B. Work Product

Of greatest significance to insurance companies and attorneys involved in disputes regarding coverage is the court's analysis regarding whether materials such as those prepared by CIGNA were prepared in anticipation of litigation so as to fall within the work product immunity of trial rule 26(B)(3). The court first discussed the effect of the existence of mental conclusions and opinions in requested documents. Claims files naturally contain opinions and recommendations as to whether particular claims are covered, but, as noted by the court of appeals, even those mental impressions are discoverable if the documents themselves were not prepared in anticipation of litigation.³⁷ Even if the materials do fall within the work product privilege, the claimant can still gain access to them if the claimant establishes a substantial need for the materials and an inability to obtain substantially equivalent information absent undue hardship; this, of course, does not affect the absolute privilege accorded to an attorney's mental impressions or theories by rule 26.³⁸

Having recognized the necessity of an anticipation of litigation on the part of the insurer, the court next faced the difficult determination as to when there is a sufficient link between the prospect of litigation and the preparation of the materials in question.³⁹ Of the various formulas available for the determination, the court chose to look to Wright and Miller for the best solution.⁴⁰ According to Wright and Miller, the test is " 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.' " ⁴¹

Noting that application of this test to materials prepared by insurance companies is especially difficult, the court looked to decisions from other jurisdictions. By examining the process by which an insurer reaches a

173 (1976)); *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Continental Casualty Co. v. Novy*, 437 N.E.2d 1338 (Ind. Ct. App. 1982).

³⁵473 N.E.2d at 1037.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* The court referred to 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970).

⁴¹473 N.E.2d at 1037 (quoting 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 198 (1970)) (emphasis added by the court).

decision regarding coverage, a court can reasonably determine the point at which the insurer's activity shifts from mere evaluation of a claim to the point at which the prospect of litigation is substantial and imminent.⁴² Such a determination is fact-sensitive. The court made it clear that it was rejecting the rule of some jurisdictions that the filing of a claim triggers an insurer's anticipation of litigation.⁴³ Rather, the court selected the reasoning in *Carver v. Allstate Ins. Co.*,⁴⁴ as elaborated upon in several exemplary cases,⁴⁵ for the approach to be taken regarding the documents requested by Hagerman. Because of the court's limited scope of review, the opinion merely concludes that the trial court could correctly have concluded that the seven documents were not prepared with the requisite anticipation of litigation.⁴⁶

The court of appeals closed its opinion with a brief discussion of the two competing policies in this area of the law.⁴⁷ On the one hand, the discovery process is designed to prevent a party from withholding important facts to which the other party is entitled when preparing for trial. On the other hand, a lawyer putting forth the effort for trial should not be hampered by fears that an opponent will gain access to and benefit from the product of that effort.⁴⁸

CIGNA took the position that insurance companies should receive blanket protection from such discovery anytime a claim is filed.⁴⁹ The court noted that such immunity from discovery would relieve insurers of the usual obligations designed to prevent the discovery process from being an opportunity for a party to benefit from the withholding of critical information.⁵⁰ The fact that insurers deal with claims that have the potential to lead to litigation does not in itself warrant the limited immunity afforded under trial rule 26(B)(3).⁵¹ Based upon the facts of the case, the court found that CIGNA had not anticipated the litigation at the time it prepared the seven documents, and Hagerman was permitted to discover them.

⁴²473 N.E.2d at 1038.

⁴³*Id.* at 1039.

⁴⁴94 F.R.D. 131 (S.D. Ga. 1982).

⁴⁵473 N.E.2d at 1038-39. The court of appeals summarized the facts and holdings in several decisions involving similar issues. See *State Farm Fire and Casualty Co. v. Perrigan*, 102 F.R.D. 235 (D. Va. 1984); *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420 (S.D.N.Y. 1981); *APL Corp. v. Aetna Casualty & Surety Co.*, 91 F.R.D. 10 (D. Md. 1980).

⁴⁶473 N.E.2d at 1039.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

III. CONCLUSION

*CIGNA-INA/Aetna v. Hagerman-Shambaugh*⁵² is not significant for the result reached by the courts involved. Instead, the impact of the case lies in its establishment of the general guidelines to be used by judges and parties when dealing with the discoverability of materials prepared by an insurance company in response to a claim. Naturally, the fact-sensitive approach used by the court of appeals will not result in the quick solutions provided by the absolute positions adopted in other jurisdictions.⁵³ It should be noted, however, that trial rule 26(B)(3), particularly in light of the competing interests involved, was not intended to bring a quick resolution to the question of whether requested materials were prepared in anticipation of litigation. Rather, the rule was designed to permit parties to prepare adequately for trial by permitting discovery of all relevant information while at the same time protecting those items prepared with the expectation that a lawsuit will ensue.⁵⁴

Even so, depending upon the number of documents in question, the parties will not necessarily be unduly delayed while a court determines the discoverability of the items. In *CIGNA*, the trial court announced its decision the day after the insurer submitted the documents for inspection.⁵⁵ Now that the court of appeals has established the approach to be used in resolving this discovery question, trial courts and parties will be better able to distinguish between facts which indicated that the materials were prepared in the ordinary course of an insurer's business and those which indicate the requisite anticipation of litigation. In addition, the *CIGNA* court's fact-sensitive approach will lead to results consistent with the competing policies embodied in trial rule 26(B)(3).

⁵²473 N.E.2d 1033.

⁵³The approaches which require attorney involvement or give blanket protection, discussed at *supra* notes 13-16 and accompanying text, are most likely to give immediate, though often arbitrary, answers to the problem.

⁵⁴*Hickman*, 329 U.S. at 510-12; *Maricopa County*, 137 Ariz. at 334, 670 P.2d at 732.

⁵⁵473 N.E.2d at 1035.

The Defense of Voluntary Intoxication: Now You See It, Now You Don't

SUSAN D. BURKE*

I. INTRODUCTION

Traditionally, the general rule has been that voluntary intoxication is no defense in a criminal prosecution.¹ It has even been stated that "[t]he rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases."² In the past, Indiana has recognized certain exceptions to this general rule. Specific exceptions have included situations where chronic intoxication has created a mental disease which has allowed the defendant to raise a defense of insanity, and situations where the defendant's voluntary intoxication has been used to negate the special intent element contained in crimes requiring specific intent.³ While the former exception appears to remain unchanged,⁴ the latter exception as well as the general rule appear, at first glance, to have been radically altered by the Indiana Supreme Court's decision in *Terry v. State*.⁵ From a practical standpoint, however, the change in Indiana's voluntary intoxication defense may be much less radical than first appears. To appreciate fully the impact of *Terry* and its progeny on the defense of voluntary intoxication, a brief examination of the statutory changes in the defense and the history of specific versus general intent is necessary.

II. GENERAL AND SPECIFIC INTENT

General intent has been defined as the intent to engage in the prohibited act, while specific intent requires a desire for a particular result or purpose.⁶ This distinction has been particularly important in

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¹See, e.g., Annot., 8 A.L.R. 3d 1236, 1240 (1966).

²*Id.*

³Conour, *Criminal Justice Notes*, 24 RES GESTAE 6, at p. 284 (June 1980).

⁴Although there have been no cases specifically altering this type of exception since the voluntary intoxication defense in Indiana was changed, *Harlan v. State*, 479 N.E.2d 569 (Ind. 1985), raises doubts about the continued viability of the exception. In *Harlan*, the defendant sought an instruction on the defense of voluntary intoxication, claiming that his heavy consumption of alcohol over a period of several years had contributed to his "temporary insanity." The court summarily dismissed the defendant's argument even though he had a twenty-five year history of drinking and suffered from delirium tremens subsequent to his arrest.

⁵465 N.E.2d 1085 (Ind. 1984).

⁶Conour, *supra* note 3, at 284.

the context of the voluntary intoxication defense because of the evidentiary rule of "presumed intent."⁷ This rule allows the general intent to commit a crime to be inferred or presumed from the actual commission of the voluntary act(s) because of the general presumption that a person intends the normal consequences of his voluntary acts.⁸ It is because of this presumption that voluntary intoxication has traditionally been no defense to general intent crimes. " '[W]hen one voluntarily becomes intoxicated, guilt is attached to the intoxication itself and is then transferred to the criminal act, supplying the required culpability.' "⁹ This traditional view would appear to be grounded in the public policy concern that if one voluntarily undertakes to become intoxicated, he generally assumes the responsibility for any wrongdoing he may commit as a result of his intoxication.¹⁰

When considering those crimes which involve a special or specific intent in addition to the general mens rea required for a criminal act,¹¹ however, the historical treatment of voluntary intoxication as a defense has been somewhat more generous.¹² Nevertheless, a problem encountered throughout the history of the voluntary intoxication defense has been honing the definition of "specific intent" and determining to which crimes it will apply.¹³ In *Carter v. State*,¹⁴ the court noted that the defense appeared to apply only to two types of offenses: those "wherein the crime depends upon the intent, purpose (not motive), aim, or goal with which an act was done," and those "wherein knowledge of an attendant circumstance is a material element of the crime."¹⁵

The latter category of crimes — those requiring knowledge of attendant circumstances — would include, for example, causing injury to a police officer or knowingly receiving stolen property.¹⁶ These offenses seem to

⁷See *Carter v. State*, 408 N.E.2d 790, 794-95 n.6 (Ind. Ct. App. 1980). This decision also contains a lengthy and comprehensive analysis of specific and general intent and the history of the voluntary intoxication defense in Indiana.

⁸*Id.*

⁹*Id.* at 798 (quoting *Greider v. State*, 270 Ind. 281, 284, 385 N.E.2d 424, 426 (1979)).

¹⁰*Id.*

¹¹In other words, these offenses require a desire to provoke a specific outcome or consequence as opposed to those which require only a "guilty mind" to be coupled with the prohibited act.

¹²See *Carter*, 408 N.E.2d at 797-801 for an historical analysis of voluntary intoxication as it relates to specific intent crimes.

¹³*Id.*

¹⁴408 N.E.2d 790 (Ind. Ct. App. 1980).

¹⁵*Id.* at 799.

¹⁶In offenses such as these, a required element of the crime is some type of special knowledge. For example, if the defendant causes injury to a person who is a police officer, but does not know he is a police officer, he might be charged with battery. However, unless it is shown that he knew or should have known his victim was a police officer, the knowledge element of the offense is missing. In terms of the intoxication defense,

have been specific intent crimes. However, the first category, which involves commission of a crime with a purpose or aim to cause a specific consequence, appears to have been quite troublesome for the courts.¹⁷ Although this first category of offense has typically included statutory language such as "with intent to,"¹⁸ this has not always been the case. Examples of offenses which have been held arguably to require a specific intent without this statutory language are rape,¹⁹ public indecency,²⁰ and even malicious trespass.²¹ Although the decisions in these cases were somewhat equivocal, they demonstrate some of the problems which have faced the courts in determining whether an offense requires a specific intent and thus makes the defense of voluntary intoxication available to the defendant.²² As noted in *Carter*, "[T]he plethora of cases and materials on the subject leads to the conclusion that specific intent and the defense of voluntary intoxication is incapable of concise, succinct definition."²³ Despite these problems, the legislature, through changes in the appropriate statutory language, has attempted to provide more precise guidelines.

III. STATUTORY TREATMENT OF VOLUNTARY INTOXICATION

Prior to 1980, Indiana Code section 35-41-3-5(b) stated: "Voluntary intoxication is a defense only to the extent that it negates specific intent."²⁴ It was because of this language and the prior common law as it related to voluntary intoxication that the problems noted previously arose. In *Williams v. State*,²⁵ the Indiana Supreme Court addressed the issue of specific intent when determining whether a defendant charged with robbery²⁶ was entitled to an instruction on the defense of voluntary intoxication. Although the statutory definition of robbery did not contain the term "with intent to," it did contain the more general and much more common term "knowingly or intentionally."²⁷

"[i]f the accused was too drunk to know the 'victim' was a police officer, he cannot be convicted" *Carter*, 408 N.E.2d at 799.

¹⁷408 N.E.2d at 801.

¹⁸*Id.* at 799.

¹⁹*Id.* at 800.

²⁰*Id.* at 800-01.

²¹*Id.* at 801.

²²*Id.*

²³*Id.* at 799.

²⁴IND. CODE § 35-41-3-5(b) (1976), amended by Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

²⁵402 N.E.2d 954 (Ind. 1980).

²⁶Robbery is defined as the knowing or intentional taking of property from another person. IND. CODE § 35-42-5-1 (1982).

²⁷*Id.* "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." IND. CODE § 35-41-2-2 (1982).

The court concluded that robbery was a specific intent crime warranting the intoxication instruction because the use of "knowingly" in the statute required that "[t]he taking proscribed must be accompanied by an actual and existing awareness of a high probability that the taking is being accomplished."²⁸ The court did not abandon the requirement that a specific intent crime be involved before voluntary intoxication could be a defense. However, by implying that any crime defined by the term "knowingly" was one involving specific intent, it appeared that the court was vastly expanding the class of criminal acts to which a defense of voluntary intoxication would be applicable.²⁹

Any impact of the *Williams* decision appeared to be shortlived. In 1980 the legislature enacted an amendment to Indiana Code section 35-41-3-5.³⁰ This amendment struck the words "specific intent" and provided that voluntary intoxication would be a defense only where it "negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to.'"³¹ Although this revision of the statute eliminated some criminal acts which had traditionally been entitled to the defense,³² it did appear to simplify the task of determining what crimes were to be considered those of specific intent for the purpose of asserting the defense.

IV. THE APPARENT EXPANSION OF THE DEFENSE

Although several years passed with little apparent change in the defense, in 1984 the Indiana Supreme Court decided *Sills v. State*.³³ In *Sills*, the court indicated it was considering a return to a broader application of the voluntary intoxication defense, similar to that favored by the court in *Williams*.³⁴ In *Sills* the defendant was charged with murder, a crime which did not contain the requisite "with intent" or "intention to" language.³⁵ The majority in *Sills* decided that it was not error for the trial court to have refused the defendant's tendered instruction on the defense of intoxication because the crime did not fit

²⁸402 N.E.2d at 955.

²⁹Because a "knowing" intent requires only awareness of a high probability that the proscribed act will occur instead of an active intent to cause its occurrence, more crimes come within the defense of voluntary intoxication, i.e., robbery, battery, criminal trespass, and theft. In addition, these types of offenses would seem to occur much more often than other more traditional specific intent crimes such as murder.

³⁰Act of February 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

³¹*Id.*

³²For example, murder, a crime which had historically been one for which the defense of voluntary intoxication was available, no longer was entitled to the defense because it did not contain the requisite statutory language. IND. CODE § 35-42-1-1 (1982).

³³463 N.E.2d 228 (Ind. 1984).

³⁴402 N.E.2d 954.

³⁵463 N.E.2d at 236.

into the statutory language,³⁶ but in a lengthy and vigorous concurrence in the result, Chief Justice Givan concluded that the language of the intoxication statute as amended in 1980³⁷ was "an anomaly in legal language,"³⁸ and was therefore unconstitutional.³⁹

Using the example of murder, a crime which had traditionally been considered one of specific intent⁴⁰ but which was inappropriate for the application of the intoxication defense pursuant to the statute, Justice Givan stated that holding that the murder statute⁴¹ did not contain the language required in the voluntary intoxication statute was "a strain of statutory interpretation."⁴² In deciding that the statute as amended should be found unconstitutional, Justice Givan discussed specific versus general intent and mens rea in general, and concluded that the statute as a whole was unworkable.⁴³

In *Terry v. State*,⁴⁴ the court adopted the argument for the unconstitutionality of the voluntary intoxication statute which had been advanced by Justice Givan in his concurrence in *Sills*.⁴⁵ In finding Indiana Code section 35-41-3-5(b) void and without effect,⁴⁶ the court quoted extensively from the *Sills* concurrence and stated that

[a]ny factor which serves as a denial of the existence of *mens rea* must be considered by a trier of fact before a guilty finding is entered. Historically, facts such as age, mental condition, mistake or intoxication have been offered to negate the capacity to formulate intent. The attempt by the legislature to remove the factor of voluntary intoxication, except in limited situations, goes against this firmly ingrained principle.⁴⁷

Although technically the court's finding in *Terry* that Indiana Code section 35-41-3-5(b)⁴⁸ was unconstitutional and invalid was dictum,⁴⁹ it is dictum that has been repeated numerous times since *Terry* was de-

³⁶*Id.*

³⁷IND. CODE § 35-41-3-5(b) (1982).

³⁸463 N.E.2d at 240.

³⁹*Id.* at 243.

⁴⁰*See Carter*, 408 N.E.2d 790.

⁴¹IND. CODE § 35-42-1-1 (1982).

⁴²463 N.E.2d at 240.

⁴³*Id.* at 240-43.

⁴⁴465 N.E.2d 1085 (Ind. 1984).

⁴⁵*Id.* at 1087.

⁴⁶*Id.* at 1088.

⁴⁷*Id.*

⁴⁸As amended by Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

⁴⁹Because the court in *Terry* found that the defendant was not entitled to an instruction on voluntary intoxication, the determination that IND. CODE § 35-51-3-5(b) as amended was unconstitutional was not necessary to reach the issue raised on appeal.

cided.⁵⁰ In *Hibshman v. State*,⁵¹ the Third District Court of Appeals considered *Terry* and its progeny and concluded:

[I]t seems inescapable that where the legislature has defined a criminal offense *to include* the elements of intentionally or knowingly, it would violate fundamental fairness, i.e. due process, to preclude the jury from considering evidence relevant to that issue of intent merely because it arose in the context of voluntarily induced intoxication.⁵²

The effect of the court's decision in *Terry* was to make the defense of voluntary intoxication available to those charged with any crime, regardless of the type of intent involved.⁵³ From an evidentiary standpoint, this change in the law would seem to be a sweeping and radical one. From a practical, outcome-oriented standpoint, however, the change appears much less drastic because of the level of intoxication which must be shown before a defendant is entitled to a jury instruction on the defense.⁵⁴ Whereas traditionally the type of offense determined whether evidence of voluntary intoxication was admissible,⁵⁵ Indiana now provides for blanket admissibility of intoxication evidence. The judge then determines whether there is a sufficient evidentiary predicate to warrant a jury instruction on the defense.⁵⁶ As the court noted in *Terry*,⁵⁷ and as seen in subsequent decisions, this evidentiary predicate may be very difficult to meet.

V. THE NARROW STANDARD FOR EXCULPATION

The court in *Terry* set forth a general standard for the availability of the defense by noting that "[i]t is difficult to envision a finding of not guilty by reason of intoxication when the acts committed require a significant degree of physical or intellectual skills."⁵⁸ If the defendant

⁵⁰See, e.g., *Butrum v. State*, 469 N.E.2d 1174 (Ind. 1984); *Anderson v. State*, 469 N.E.2d 1166 (Ind. 1984); *Murphy v. State*, 469 N.E.2d 750 (Ind. 1984); *Zachary v. State*, 469 N.E.2d 744 (Ind. 1984).

⁵¹472 N.E.2d 1276 (Ind. Ct. App. 1985).

⁵²*Id.* at 1278.

⁵³See *Terry*, 465 N.E.2d at 1088.

⁵⁴Although in Indiana a defendant is now entitled to submit evidence of intoxication in any criminal defense, as will be seen in *Terry*'s progeny, the level of intoxication must be extremely high before the defendant is entitled to have this evidence considered by the jury. See *infra* text accompanying notes 58-68.

⁵⁵See the discussion contained in *Carter v. State*, 408 N.E.2d 790 (Ind. Ct. App. 1980). See also Annot., 8 A.L.R. 3d 1236 (1966).

⁵⁶This evidentiary predicate, which relates to the level of intoxication required to raise a reasonable doubt as to the defendant's culpability for his actions, determines whether the judge will instruct the jury on the voluntary intoxication defense.

⁵⁷465 N.E.2d at 1088.

⁵⁸*Id.*

was able to "devise a plan, operate equipment, instruct the behavior of others or carry out acts requiring physical skills," he would not be entitled to exculpation on the basis of his intoxication.⁵⁹ The defendant in *Terry*, who was charged with attempted murder, had made decisions regarding his course of action and had driven a car. Because of those actions, the court held that the trial judge's refusal to give the defendant's tendered instruction on the defense was not error, even in light of the court's expansion of the defense.⁶⁰

The standard of *Terry* was subsequently applied in *Watkins v. State*,⁶¹ where the court found that because a defendant charged with burglary had been able to climb through a basement window, run up and down stairs, converse with his companions, search through a closet, and threaten the victim with a knife, he was not entitled to an instruction on voluntary intoxication even though he had allegedly consumed nine beers, wine, and smoked two marijuana cigarettes.⁶² The court concluded that the evidence of the defendant's activities at the time of the offense was sufficient to show that he possessed the requisite mens rea for burglary.⁶³

In *Hubbard v. State*,⁶⁴ the defendant complained that the trial judge had erred in concluding that voluntary intoxication was not a defense to robbery and in giving the jury an instruction predicated on Indiana Code section 35-41-3-5(b), which had been found invalid by the supreme court in *Terry*.⁶⁵ In reviewing the defendant's argument, the court stated that the standard for determining the availability of an instruction on voluntary intoxication was that set forth in *Williams v. State*.⁶⁶ Although *Williams* was decided prior to *Terry*, it was also decided before the amendment to Indiana Code section 35-41-3-5 became effective.⁶⁷ In order to satisfy the evidentiary predicate under the *Williams* standard, the evidence, if believed, must be "such that it could create a reasonable doubt in the mind of a rational trier of fact that the accused entertained the requisite specific intent."⁶⁸

The use in *Hubbard*⁶⁹ of the *Williams* standard would seem to indicate that Indiana still retains the distinction between specific and general

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹468 N.E.2d 1049 (Ind. 1984).

⁶²*Id.* at 1051.

⁶³*Id.*

⁶⁴469 N.E.2d 740 (Ind. 1984).

⁶⁵465 N.E.2d at 1087.

⁶⁶469 N.E.2d at 742.

⁶⁷IND. CODE § 35-41-3-5, as amended by Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980, became effective on September 1, 1980. *Williams* was decided on April 7, 1980. Therefore, the statute in effect at the time that *Williams* was decided still contained the "specific intent" language which was arguably broader and more open to interpretation than the amended language which the court struck down in *Terry*.

⁶⁸402 N.E.2d at 956.

⁶⁹469 N.E.2d 740.

intent crimes. Because *Williams* extended the definition of specific intent crimes to include those defined by "knowing" intent,⁷⁰ however, it would seem that only the small number of crimes defined by "reckless" intent⁷¹ would remain as general intent crimes. Any remaining distinction between specific and general intent crimes would also seem to be significant only to the extent that it might affect the evidentiary predicate required to procure an instruction on the voluntary intoxication defense.⁷²

VI. UNANSWERED QUESTIONS

In *Butrum v. State*⁷³ the issue was whether voluntary intoxication is an affirmative defense or merely evidence on the issue of mens rea. In *Butrum*, the defendant objected to an instruction that "'[v]oluntary intoxication is not a defense to the crime of murder'"⁷⁴ because he had not put forth a claim of voluntary intoxication.⁷⁵ The State had attempted to preclude any evidence of the defendant's intoxication, but the trial court had overruled the State's motion on the ground that although intoxication was *not a defense itself*, it *was* relevant to the defendant's mental state and therefore admissible.⁷⁶ The Indiana Supreme Court held that the trial court had acted correctly and in accord with *Terry*.⁷⁷

In reaching that conclusion, the court stated that although the *Terry* decision recognized voluntary intoxication as a defense, the real question in *Terry* was "whether or not appellant's intoxication was sufficient to deprive him of the ability to form the necessary intent."⁷⁸ The court also stated that the trial judge in *Butrum* had been correct in determining that "it is not intoxication that is a defense, but rather that intoxication may be considered as would any other mental incapacity of such severe degree that it would preclude the ability to form intent."⁷⁹

⁷⁰402 N.E.2d at 955.

⁷¹"Reckless" intent is defined as "plain, conscious and unjustifiable disregard of harm" which "involves a substantial deviation from acceptable standards of conduct." IND. CODE § 35-41-2-2 (1982). Crimes in Indiana defined by "reckless" intent include reckless homicide (IND. CODE § 35-42-1-5 (1982)), criminal recklessness (IND. CODE § 35-42-2-2 (1982)), provocation (IND. CODE § 35-42-2-3 (1982)), and mischief (IND. CODE § 35-43-1-2 (1982)).

⁷²Because "specific intent" crimes arguably require a more sophisticated or complex set of actions, the level of intoxication required to obtain an instruction on lack of intent may be somewhat lower than for general intent crimes.

⁷³469 N.E.2d 1174 (Ind. 1984).

⁷⁴*Id.* at 1176.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

The decision in *Butrum* therefore appeared to contradict an earlier decision, *Jones v. State*,⁸⁰ which had implied that voluntary intoxication was what would traditionally be considered an "affirmative defense."⁸¹ In *Jones*, the court had explicitly stated that voluntary intoxication was a defense and that the defendant bore the burden of proof on the issue.⁸² The recent decision in *Eagan v. State*,⁸³ however, seems to cast some doubt on precisely what the court intended by its treatment of voluntary intoxication in *Butrum*.

In *Eagan*, the defendant was charged with attempted murder, and on appeal he complained that the trial court had erred in giving an instruction on the defense which was based on the invalid provision of Indiana Code section 35-41-3-5(b).⁸⁴ The court found that although the statutory provision had been found unconstitutional, giving the instruction under the facts of the case had not been error.⁸⁵ In reaching its conclusion, the court stated that "[a]lthough there was some evidence presented that the Defendant may have been intoxicated at the time he committed the crime, *it was never interposed as a defense*; and the record reveals that his intoxication, if existing, was not of the debilitating degree that could have raised a reasonable doubt upon the existence of the requisite *mens rea*."⁸⁶

The impact of this language in *Eagan* is uncertain because of the lack of any subsequent interpretation. It could mean that voluntary intoxication is an affirmative defense. However, the statement may have been prompted by peculiar circumstances in the lower court proceedings. In any event, it appears that further clarification of the procedural role of voluntary intoxication is needed.

In addition to the confusion surrounding intoxication's procedural role, the degree and type of incapacity required for exculpation may indicate that voluntary intoxication as an *independent* basis for exculpation has all but been eliminated. The standard for invocation of the intoxication defense has risen to the point where it is similar to the standard which must be met for the invocation of the insanity defense. In the *Butrum* decision, in addition to the court's emphasis on intoxication rising to the level of mental incapacity,⁸⁷ the court cited with apparent approval the trial judge's instruction on capacity to form intent.⁸⁸ This

⁸⁰458 N.E.2d 274 (Ind. Ct. App. 1984).

⁸¹See LA FAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 152 (1972).

⁸²458 N.E.2d at 276.

⁸³480 N.E.2d 946 (Ind. 1985).

⁸⁴*Id.* at 951.

⁸⁵*Id.*

⁸⁶*Id.* (emphasis added).

⁸⁷469 N.E.2d at 1176.

⁸⁸The trial judge's instruction read, "Mental disease or mental defect includes any

instruction substantially paralleled the statutory language of mental disease or defect found in Indiana Code section 35-36-1-1.⁸⁹

This emphasis on the need for intoxication to rise to a level approaching insanity was even more apparent in *Jones v. State*.⁹⁰ In noting that "[m]ere intoxication, in the absence of some mental incapacity, . . . cannot be regarded as sufficient,"⁹¹ the *Jones* court added that "[t]he mental incapacity must render a person incapable of appreciating the wrongfulness of his conduct or of conforming his conduct to the requirements of law"⁹² This standard conformed exactly to the statutory language of the insanity defense then in effect.⁹³ Although *Jones* was decided shortly before *Terry*, the decision in *Butrum*⁹⁴ would seem to indicate that the level and type of intoxication required for exculpation in *Jones* is still good law.

If the degree of a defendant's intoxication must rise to a level of mental incapacity akin to insanity, it might well be easier to eliminate the separate defense of voluntary intoxication while allowing intoxication to be considered within the insanity defense. Of course, by so doing, the traditional approach to intoxication as a defense to specific intent crimes would be discarded. In addition, it seems possible to envision a situation where a defendant charged with a specific intent crime such as burglary⁹⁵ might demonstrate a level of intoxication sufficient to negate the "intent to commit a felony,"⁹⁶ but insufficient to negate the intent for breaking and entering. In this case, the defendant would be entitled to an intoxication instruction for the crime of burglary, but not for the arguably lesser included offense of criminal trespass.⁹⁷ Although there

abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. . . ." *Id.*

⁸⁹IND. CODE § 35-36-1-1 provides that mentally ill "means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function"

⁹⁰458 N.E.2d 274.

⁹¹*Id.* at 276.

⁹²*Id.*

⁹³IND. CODE § 35-41-3-6(a) (amended by Act of Feb. 24, 1984, Pub. L. No. 184-1984, § 1, 1984 Ind. Acts 1501) in effect at the time provided that:

A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.

⁹⁴469 N.E.2d 1174.

⁹⁵Burglary is defined by statute as breaking and entering a building or structure of another person *with the intent to commit a felony* in it. IND. CODE § 35-43-2-1 (1982). Because of the requirement of a special intention to bring about a certain result, burglary would traditionally have been considered a specific intent crime.

⁹⁶*Id.*

⁹⁷Criminal trespass can be committed by knowingly or intentionally entering the real

have not yet been any cases decided on this issue of lesser included offenses, it seems that the situation may pose some problems for attorneys and judges alike, especially where multiple lesser included offenses are involved.

VII. CONCLUSION

The practical status of voluntary intoxication in Indiana in the wake of *Terry v. State*⁹⁸ remains somewhat unclear despite the courts' attempts to create an appropriate standard. The lack of clarity seems to stem primarily from confusion as to whether intoxication is an affirmative defense which must be raised and proven by the defendant, or whether it is simply evidence to show that the defendant lacked the capacity to form the intent to commit the crime. A *mens rea*, or "guilty mind", has long been required to hold a person responsible for his "guilty act,"⁹⁹ and when the intoxication defense is available to those charged with general intent crimes, the intent element would appear to be equivalent to *mens rea*. If this is the case, voluntary intoxication would not be an affirmative defense because it goes directly to an element of the crime.¹⁰⁰

This latter interpretation is supported by Chief Justice Givan's concurrence in *Sills v. State*¹⁰¹ where he stated:

Likewise, if intoxication, whether it be voluntary or involuntary, renders that individual so completely *non compos mentis* that he has no ability to form intent, then under our constitution and under the firmly established principles of the *mens rea* required in criminal law, he cannot be held accountable for his actions, no matter how grave or how inconsequential they may be.¹⁰²

Unfortunately, this apparently clear statement has become less clear in light of an apparent equation of intent with voluntary acts in the *Sills* concurrence¹⁰³ and in subsequent cases stressing the physical acts of the

property of another, IND. CODE § 35-43-2-2 (1982), and can therefore be considered, under appropriate circumstances, a lesser included offense of burglary (all of the elements of criminal trespass would be included in burglary, and burglary would include at least one element not found in criminal trespass).

⁹⁸465 N.E.2d 1085.

⁹⁹See, e.g., LA FAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 191-92 (1972). See also *Sills v. State*, 463 N.E.2d at 241-42 (Justice Givan concurring in the result).

¹⁰⁰See *supra* note 81.

¹⁰¹463 N.E.2d 228.

¹⁰²*Id.* at 242.

¹⁰³*Id.* at 241-43.

defendant.¹⁰⁴ Many of the problems that have plagued the insanity defense as it relates to mens rea¹⁰⁵ will probably also visit the voluntary intoxication defense now in effect in Indiana.

The one clear observation, however, is that what at first glance may seem to be a radical expansion of the defense of voluntary intoxication by the court in *Terry* may be better characterized as merely a procedural change in the way the defense is handled from an evidentiary standpoint. Because of all the underlying uncertainties, successful invocation of the voluntary intoxication defense will continue to be a difficult proposition in Indiana.

¹⁰⁴See *supra* notes 58-72 and accompanying text.

¹⁰⁵See, e.g., Note, *Due Process and the Insanity Defense: Examining Shifts in the Burden of Persuasion*, 53 NOTRE DAME LAW. 123 (1977). See also Note, *Mens Rea, Due Process and the Burden of Proving Sanity or Insanity*, 5 PEPPERDINE L. REV. 113 (1977).

Inequitable Treatment of Ineffective Assistance Litigants

RICHARD VAN RHEENEN*

I. INTRODUCTION

A criminal defendant has a federal constitutional right to the effective assistance of counsel.¹ A defendant, therefore, may challenge his conviction on the basis of ineffective assistance by his counsel.² If the defendant is able to prove such ineffectiveness, he is entitled to a new trial.³

Most claims of ineffective assistance of counsel involve challenges to an attorney's acts or omissions that may be characterized as trial tactics and strategies. The courts will not, however, question an attorney's conduct if it is based on reasoned trial tactics or strategies.⁴ Thus, because the defendant must prove that the acts or omissions complained of were *not* the product of reasoned trial strategy, the need for an evidentiary hearing to probe the challenged attorney's reasoning is great.⁵ In spite of this great need for an evidentiary hearing, Indiana law often fails to provide a defendant with a right to an evidentiary hearing when such a hearing is crucial to his success in an ineffective assistance of counsel claim.

Indiana case law requires that ineffective assistance claims be raised at the earliest possible opportunity;⁶ thus, a claimant must raise his claim on direct appeal if an attorney different from the lawyer whose inadequacy is asserted files the motion to correct error or belated motion to correct error.⁷ If the "inadequate" trial counsel files the motion to correct error, the claimant's forum is a post-conviction proceeding because, obviously, the trial lawyer will not assert his own ineffectiveness in a motion to correct error he drafted.⁸ Although there is a right to an evidentiary hearing in post-conviction proceedings,⁹ there is no such right in connection with a motion or belated motion to correct error.¹⁰ This

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¹*E.g.*, *Strickland v. Washington*, 104 S. Ct. 2052 (1984). The right to the effective assistance of counsel is guaranteed by the sixth amendment to the United States Constitution. *Id.*

²*See id.*

³*See, e.g.*, *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984).

⁴*See infra* text accompanying notes 7-12.

⁵*See infra* text accompanying notes 7-18.

⁶*See infra* notes 39-46 and accompanying text.

⁷*Id.*

⁸*See infra* notes 45-46 and accompanying text.

⁹IND. RULE OF PROCEDURE FOR POST-CONVICTION REMEDIES I § 4(f).

¹⁰IND. R. TR. P. 59; *see also infra* notes 20-30 and accompanying text.

disparity in the right to an evidentiary hearing has nothing to do with the substance of the claims, but depends only on the procedural posture of the litigants.

During the Survey period, several cases were decided that perpetuate this inequitable disparity. This Article will analyze the problem created by this disparity, discuss tactical options presently available for obtaining an evidentiary hearing, and suggest a fair resolution to the state appellate courts.

II. THE NEED FOR AN EVIDENTIARY HEARING

Obtaining an evidentiary hearing is critical to the success of most ineffective assistance claims. In *Strickland v. Washington*,¹¹ the United States Supreme Court decided that the proper standard for attorney performance was "reasonably effective assistance."¹² The Court stated that the burden of proof was on the proponent of the claim,¹³ and that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"¹⁴ Thus, a proponent must prove that the trial attorney's actions or omissions complained of were *not* sound trial strategy.

The *Strickland* Court discussed the parameters of sound trial strategy and adopted the following guidelines for assessing an attorney's strategic decisions: "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."¹⁵ The Court clearly envisioned that an ineffective assistance litigant would have to probe his former lawyer's legal and factual investigation in order to establish that a given act or

¹¹104 S. Ct. 2052 (1984).

¹²*Id.* at 2064.

¹³*Id.* at 2065.

¹⁴*Id.* at 2066 (quoting *Michel v. New York*, 350 U.S. 91, 101 (1955)). According to the Court, the presumption of competency is justified by "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions." *Id.* at 2065.

One with sufficient resources should be able to muster evidence showing that in Indiana, only three credit hours of criminal law are required to practice felony criminal law, and no continuing education is required. See IND. RULE FOR ADMISSION 13. Therefore, no standard of educational requirements sufficient to justify the presumption of competency exists. One might reply that the Code of Professional Responsibility requires a lawyer in over his head to attach himself to another more competent lawyer, but the breach of that ethical duty is necessarily concomitant to any proven inadequacy claim, and therefore of no use as a standard justifying a presumption of competency.

¹⁵104 S. Ct. at 2066.

omission was not sound strategy. This entails proving the act or omission itself, the attorney's reason for the act or omission, and an unreasonable lack of investigation.

Consider the following example: The defendant is convicted of intentionally burning a house to collect insurance proceeds. Although the state's assertion that the fire was deliberate rests on thin evidence, the defense attorney stipulates to the correctness of that claim, and proceeds solely on the theory that someone other than his client set the fire. Perhaps the lawyer introduces evidence tending to prove that the defendant's ex-wife, bitter over a divorce, set the fire. The client asserts that his lawyer rendered ineffective assistance by stipulating the fire was arson. Without an evidentiary hearing, the record of proceedings proves that the stipulation was made, but fails to provide any evidence of the lawyer's reason. In addition, the only evidence of investigation is a motion for discovery. The court on review will note that *there might have been* a valid reason for the lawyer's decision to concentrate the defense on who set the fire rather than on whether it was set. Because the burden of proof is on the defendant, and the record does not show that the lawyer *did not* have a good reason for stipulating the fire was arson, the court will conclude that "[t]he alleged [error is] primarily in the [area] of tactics and strategy. This Court does not second-guess trial counsel in these areas. . . ."¹⁶

Suppose, however, that an evidentiary hearing is held. The subpoenaed trial lawyer testifies that he gave the arson report only a cursory reading and stipulated the fire was arson primarily because he assumed the state was correct on that point. He also admits he did not attempt to interview the arson investigator and never considered an independent investigation or review of the data on which the state's conclusion was based. Now the claimant has proven the stipulation, the reason for the stipulation, and the inadequacy of the lawyer's investigation. The reasonable conclusion is that the lawyer's reason was not supported by adequate inquiry into the facts. The claimant has succeeded in proving his lawyer's ineffectiveness.

Indiana appellate courts, while denying direct appeal litigants the right to an evidentiary hearing, seemingly recognize the necessity of an evidentiary hearing to explore the reasons for a lawyer's incompetence and the extent of his investigation. In *Majors v. State*,¹⁷ an appeal from a denial of post-conviction relief, an evidentiary hearing was held. The trial attorney was not called as a witness. In refusing to reverse the

¹⁶Cox v. State, 475 N.E.2d 664, 674 (Ind. 1985). See also Seaton v. State, 475 N.E.2d 51, 54 (Ind. 1985); Bennett v. State, 470 N.E.2d 1344, 1347 (Ind. 1984); Elliott v. State, 465 N.E.2d 707, 710 (Ind. 1984).

¹⁷441 N.E.2d 1375 (Ind. 1982).

denial of post-conviction relief, the Indiana Supreme Court stated, “We do not speculate on why [the trial attorney] was not called. *But without evidence in the record as to his reason* [for the act of alleged incompetency], appellant’s task of proving by the preponderance of the evidence that his trial attorney was incompetent . . . is not accomplished. *In sum, appellant has failed to meet his burden of proof.*”¹⁸

A similar failure occurred in *Owens v. State*,¹⁹ also an appeal from the denial of post-conviction relief. As in *Majors*, the post-conviction attorney did not subpoena trial counsel to the post-conviction hearing. The court pointed out the resulting blow to the petitioner’s ability to meet his burden of proof. “[W]here, as in the case at bar, the petitioner does not call trial counsel as a witness, the post-conviction court is justified in inferring that trial counsel would not have corroborated the allegations of ineffective counsel.”²⁰ Again, the court affirmed the necessity of showing the reason behind the “incompetent” act or omission: “Without the benefit of counsel’s testimony here, we will conclude that counsel’s decision was a tactical judgment and not necessarily indicative of ineffective representation.”²¹ “Significantly, since petitioner failed to call counsel as a witness at the post-conviction hearing, *there is no evidence as to why counsel made the decision he did, or even if he did not consult with petitioner.*”²²

Both *Majors* and *Owens* demonstrate the Indiana Supreme Court’s recognition of the need for the allegedly “inadequate” attorney’s testimony to satisfy the claimant’s burden of proof. In spite of this implicit admission of the need for that testimony to overcome the presumption of competency, some claimants are denied an evidentiary hearing at which such evidence could be presented.

¹⁸*Id.* at 1377 (emphasis added).

¹⁹464 N.E.2d 1277 (Ind. 1984).

²⁰*Id.* at 1279.

²¹*Id.* at 1280.

²²*Id.* (emphasis added) *See also* McCann v. State, 446 N.E.2d 1293 (Ind. 1983). In *McCann*, as in *Majors* and *Owens*, the post-conviction lawyer did not call the trial attorney. He stated at the post-conviction hearing, “ ‘[W]e’re putting a man on the spot as a professional and I just don’t think that’s appropriate.’ ” *Id.* at 1299. Justice Hunter dissented from the majority’s affirmance, believing the ineffective assistance of the post-conviction lawyer had been proven. “The lack of evidence solicited on petitioner’s behalf was not the product of strategy or trial tactics; rather it was the result of post-conviction counsel’s expressly stated misunderstanding of his responsibilities to petitioner. In the circumstances present here, I find that petitioner was denied the effective assistance of counsel at the post-conviction relief hearing. . . . [I] believe the judgment of the trial court denying post-conviction relief should be reversed.” *Id.* at 1302. Justice Hunter obviously considered that the testimony of the trial lawyer would have been important, and that the lack of that testimony prejudiced the petitioner.

III. DENIAL AND WAIVER: THE INEQUITABLE DISPARITY

A. *Hearing Denial on Direct Appeal*

The Indiana Trial Rules are silent concerning the right to an evidentiary hearing on a motion to correct error.²³ And in *Keys v. State*,²⁴ an ineffective assistance of counsel case, the Indiana Supreme Court specifically stated there was *no right* to an evidentiary hearing on a motion to correct error. The court noted the permissibility of supplementing a motion to correct error with affidavits, and further reasoned that “[f]irst, the trial rules do not require a hearing. Second, *the record provides a substantial factual basis* for the court’s determination. . . .”²⁵

Although nothing in the *Keys* opinion indicated that the record of proceedings would provide a substantial factual basis for the court’s determination on ineffective assistance claims in every case, in *Harris v. State*,²⁶ the court, relying on *Keys*, broadly stated that no evidentiary hearing on the motion to correct error is required *or needed* when one of the errors alleged was incompetency of trial counsel. “‘[T]he record provides a substantial factual basis for the court’s determination of the issue. . . .’”²⁷ The court noted that affidavits may be filed with the motion to correct error and stated, “Thus there is a mechanism available to a defendant to bring facts *dehors* the record before the trial court and the Court of Appeals.”²⁸ Recently, in *Bennett v. State*,²⁹ the supreme court reaffirmed the expansive reading of *Keys* that “the record provides a substantial factual basis for a determination on that issue,”³⁰ and again implied that the filing of affidavits was an adequate substitute for an evidentiary hearing.³¹

B. *The Inadequacy of Affidavits*

Affidavits in combination with the record are no substitute for an evidentiary hearing. Although challenged acts or omissions can generally

²³IND. R. TR. P. 59.

²⁴271 Ind. 52, 390 N.E.2d 148 (1979). The court stated, “We do not believe that the trial rules necessitate such a hearing. IND. R. TR. P. 59(D) and IND. R. TR. P. 16 and 17 contemplate the use of affidavits served with the motion itself whenever errors are based upon evidence outside the record” *Id.* at 57, 390 N.E.2d at 151.

²⁵*Id.* (emphasis added).

²⁶427 N.E.2d 658 (Ind. 1981).

²⁷*Id.* at 662 (citing *Keys v. State*, 271 Ind. 52, 390 N.E.2d 148 (1979)).

²⁸*Id.* (emphasis added).

²⁹470 N.E.2d 1344 (Ind. 1984).

³⁰*Id.* at 1347.

³¹*Id.*

be proved by the record, the record generally will not reveal the "inadequate" lawyer's reasoning and investigation. The scope of the attorney's investigation often cannot be shown even with the use of affidavits. Moreover, if the "inadequate" attorney refuses to execute an affidavit, or even to be interviewed, there is no procedural mechanism by which a defendant may order him to submit to interrogatories or a deposition in connection with a motion to correct error.³²

Consider the arson hypothetical discussed above. Assuming that the arson investigator would cooperate, he could state he was not interviewed or contacted by the defense attorney. His affidavit, if unopposed, would establish as fact that he was not contacted.³³ To the proponent's detriment, the record would show a defendant's motion for discovery and a state's notice of compliance indicating delivery of the arson report. Assuming no cooperation from the trial lawyer, there would be no evidence *why* he stipulated to the fire as arson and no evidence *why* he did not interview the arson investigator or examine the raw data from which the investigator drew his conclusions. Even with the attached affidavit, a reviewing court would still note that the trial lawyer made discovery of the state's case³⁴ and would reiterate the familiar judicial refusal to speculate "as to what may have been the most advantageous strategy in a particular case."³⁵ Furthermore, an affidavit executed by the litigant, stating his belief that the lawyer had no valid tactical reason for his action, could only prove as fact the sincerity of his belief, *not* the correctness of the belief. Thus, such an affidavit would not help the claimant meet his burden of proof.³⁶

Finally, even if some type of court-enforced discovery were available in connection with a motion or belated motion to correct error, the challenged attorney might not be truthful. In those cases, the affidavit would be no substitute for a hearing where the trier of fact could observe the lawyer's demeanor and thereby judge the lawyer's credibility.

³²See *supra* notes 11-14 and accompanying text.

³³Harris v. State, 427 N.E.2d 658 (Ind. 1981).

³⁴Cf. McCann v. State, 446 N.E.2d at 1300.

³⁵Bennett v. State, 470 N.E.2d at 1347.

³⁶A review of the Record of Proceedings in *Keys v. State*, 271 Ind. 52, 390 N.E.2d 148 (Ind. 1979), revealed that the appellate attorney executed and attached an affidavit to the motion to correct error which stated the trial attorney did not interview or investigate the victim or any eyewitness. The affiant also asserted that the trial attorney conducted no independent investigation of the facts and did not investigate the possibility of pursuing an intoxication defense. Record at 119-20.

The appellate attorney also attached a memorandum to the motion to correct error alleging faulty pretrial preparation and noting that the specifics would have to be brought out in an evidentiary hearing unless the trial attorney would agree to file an affidavit. Record at 109. The supreme court stated that "nothing in the motion to correct errors, memorandum in support, or accompanying affidavits suggests more than speculation about preferable pretrial and trial tactics." 271 Ind. at 57, 390 N.E.2d at 151.

C. Post-Conviction Rule 1 Waiver

Given the unavailability of an evidentiary hearing in connection with a motion to correct error and the inadequacy of affidavits, the logical forum for ineffective assistance litigation is a post-conviction Rule 1 proceeding;³⁷ there is a *right* to an evidentiary hearing in a post-conviction proceeding.³⁸ Rule P.C.1. section 1(b), however, states that a post-conviction "remedy is not a substitute for a direct appeal";³⁹ and in *Rivera v. State*,⁴⁰ the Indiana Court of Appeals interpreted that language to mean that an ineffective assistance of counsel claim raised in a Rule P.C.1 proceeding is waived if the issue was not raised in the motion to correct error filed by appellate counsel.⁴¹ The practical effect of such a holding is to deny an evidentiary hearing to an ineffective assistance litigant if an attorney other than trial counsel files the motion to correct error or belated motion to correct error. The supreme court, in *Hollonquest v. State*,⁴² and more recently, in *Williams v. State*,⁴³ affirmed the *Rivera* holding.⁴⁴

D. Present Options for Obtaining a Hearing

Fortunately, some exceptions to the hard line in *Rivera* have developed. In *Snider v. State*,⁴⁵ the Indiana Supreme Court identified three ways for a post-conviction litigant to overcome waiver: 1) raising the issue as fundamental error;⁴⁶ 2) raising the ineffective assistance of

³⁷IND. RULES OF PROCEDURE FOR POST-CONVICTION REMEDIES 1.

³⁸*Id.* § 4(f).

³⁹*Id.* § 1(b).

⁴⁰179 Ind. App. 295, 385 N.E.2d 455 (1979).

⁴¹*Id.* at 296, 385 N.E.2d at 456.

⁴²432 N.E.2d 37, 39 (Ind. 1982). Although the court in *Hollonquest* reiterated the waiver holding of *Rivera*, the court reached the merits because the post-conviction petition also alleged the ineffective assistance of appellate counsel for not raising the trial lawyer's incompetency on direct appeal. *Id.*

⁴³464 N.E.2d 893, 894 (Ind. 1984).

⁴⁴The court in *Majors v. State*, 441 N.E.2d at 1376, went so far as to state in dicta that even where trial counsel filed the motion to correct error, the appellate attorney could file a belated motion to correct error raising the issue. This is inconsistent with the settled rule that a motion to correct error not otherwise inadequate is not rendered so by failure to include a particular allegation of error. See *Brown v. State*, 442 N.E.2d 1109, 1114-15 (Ind. 1982).

⁴⁵468 N.E.2d 1037 (Ind. 1984).

⁴⁶*Id.* at 1039. In *Williams v. State*, 464 N.E.2d 893 (Ind. 1984), decided earlier the same year, the court also identified fundamental error as a means of overcoming waiver, but imposed an increased burden of proof: "It is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated. Only when the record reveals clearly blatant violations of basic and elementary principles, and the harm or potential for harm could not be denied, will this Court review an issue not properly raised and preserved." *Id.* at 894 (quoting *Nelson v. State*, 409 N.E.2d 637 (Ind. 1980)).

Thus, the court reviewed the ineffective assistance claim although waived under *Keys*

appellate counsel as the petitioner did in *Hollonquest*;⁴⁷ and 3) justifying the prior default in some manner.⁴⁸

Bailey v. State,⁴⁹ however, recently modified *Snider* by requiring that a fundamental error claim be asserted within the framework of an ineffective assistance of counsel claim.⁵⁰ Apparently, the defendant must allege that the lawyer on direct appeal was ineffective for not raising the issue of fundamental error on direct appeal. Thus, raising the ineffective assistance of trial counsel alone as fundamental error is no longer viable; instead, the "waived" issue must be coupled with a claim of the ineffective assistance of appellate counsel.

The other option, justification of the waiver, has its roots in *Langley v. State*,⁵¹ the first comprehensive opinion explaining the function of the Rule P.C.1 proceeding. In *Langley* the court stated:

For relief to be granted where the element of waiver has been introduced at the post-conviction hearing, there must be some substantial basis or circumstance presented to the trial court which would satisfactorily mitigate a petitioner's failure to have pursued or perfected a remedy through the normal procedural routes.⁵²

In *Tope v. State*, Justice DeBruler noted in dissent that while *Bailey* modified *Snider* as to fundamental error, it did not alter or discredit the *Langley* doctrine of justification.⁵³ DeBruler dissented because he believed circumstances existed which justified the petitioner's not having raised the issue earlier.⁵⁴ Thus, according to Justice DeBruler, justification of the prior default is still a viable argument against waiver.

In sum, for attorneys faced with a waiver problem in a post-conviction posture, coupling the claim of the trial lawyer's ineffective assistance with a claim of the appellate lawyer's inadequacy for not raising the issue is the most certain method of overcoming a waiver argument.⁵⁵ Justification of the failure to raise the issue on direct appeal could also be argued. As no cases have yet affirmed the validity of the

and *Hollonquest*, but under a stricter standard. The proponent not only was required to prove that his attorney's representation was below the level of reasonably effective assistance, but also that the record reflected "blatant violations" over and above the fact that the constitutional right was implicated.

⁴⁷468 N.E.2d at 1039.

⁴⁸*Id.*

⁴⁹472 N.E.2d 1260 (Ind. 1985).

⁵⁰*Id.* at 1263.

⁵¹256 Ind. 199, 267 N.E.2d 538 (1971).

⁵²*Id.* at 207, 267 N.E.2d at 542.

⁵³477 N.E.2d 873, 876 (Ind. 1985) (DeBruler, J., dissenting).

⁵⁴*Id.* at 876-77.

⁵⁵*Hollonquest v. State*, 432 N.E.2d at 39.

justification argument, however, the result is uncertain. The justification, of course, would be the undeniable need for an evidentiary hearing.⁵⁶

Although the post-conviction attorney must confront waiver problems, the direct appeal attorney has a more fundamental decision whether to abstain deliberately from litigating the ineffectiveness issue. Currently, the most serious consequence of the present state of law is not that a post-conviction claim will be dismissed on waiver grounds, but that a direct appeal attorney, aware of *Rivera* and other waiver cases, will allow the claim to be decided on the merits even if it means foregoing an evidentiary hearing. Because a claimant has little chance of succeeding on the merits without the type of proof that can only be produced at a hearing,⁵⁷ it is not in the client's best interests to have the claim decided on direct appeal unless counsel is certain of securing a hearing on the motion or belated motion to correct error.⁵⁸ Although a lawyer not raising the claim on direct appeal may be challenged as ineffective in a Rule P.C.1 proceeding,⁵⁹ the client stands a better chance of refuting waiver at the post-conviction hearing than winning without an evidentiary hearing.

⁵⁶Of course, if the state does not assert waiver in its answer to the petition for post-conviction relief, the post-conviction court should hold an evidentiary hearing, reach the merits of the claim, and the appellate court should review the merits of the issue. See *Langley v. State*, 256 Ind. at 207, 267 N.E.2d at 542-43. ("Where, however, the state, as it did in this case, chooses to meet a petitioner's allegations on their merits at the hearing, we must do likewise on appeal.") See also *Williams v. State*, 464 N.E.2d at 895-96 (DeBruler, J., concurring in result).

⁵⁷A dramatic example of the need for a hearing can be found in *Helton v. State*, 479 N.E.2d 538, 539 (Ind. 1985). In *Helton*, the trial attorney did not object to the admission of a defectively stipulated to polygraph. The prosecutor's signature was not on the form, and had the attorney objected, the polygraph results would not have been admitted. The attorney *might* not have objected for some tactical reason. The court certainly would not have decided otherwise in the face of the presumption of competency and a lack of evidence as to the lawyer's reason. However, there was a hearing and the attorney stated he did not object because he thought the form was "good and followed the statute." With evidence in the record of his reason, based on a faulty interpretation of the law, the court reversed. *Id.*

⁵⁸There will be an occasional ineffective assistance claim where there is no need for a hearing. For example, IND. CODE § 35-36-6-1 provides for a mandatory hearing when a change of venue from the county is sought. However, if the motion is defective, it is not an abuse of discretion for the judge to deny the motion without a hearing. See *Haskett v. State*, 179 Ind. App. 655, 386 N.E.2d 1012 (1979). In such a case, the lawyer's strategy, to obtain a change of venue from the county, would be apparent from the record. Also, the defectively drafted motion could not possibly have been a tactical decision. Of course, "isolated errors" may not amount to overall ineffectiveness, because the touchstone is whether or not counsel was so deficient as to cause a breakdown in the adversarial process. See, e.g., *Strickland*, 104 S. Ct. at 2064-67; *Elliott v. State*, 465 N.E.2d 707, 710 (Ind. 1984).

⁵⁹*Hollonquest*, 432 N.E.2d at 39.

Paradoxically, a lawyer foregoing litigation of the ineffective assistance claim on direct appeal as described above is making a strategic decision, which militates against a finding of appellate inadequacy. Indeed, a lawyer can hardly fulfill his ethical duty to represent his client zealously by knowingly litigating a claim at a point where the client is deprived of the means of proving the claim.

The appellate lawyer's reasons for not raising the issue, which make success less likely on a claim of appellate ineffectiveness, however, make success more likely on a justification argument. Accordingly, an ineffective assistance allegation against the appellate lawyer should be posed alternatively with a justification argument, i.e., that the failure to raise the issue on direct appeal was grounded in "some substantial basis or circumstances"⁶⁰ — futility.

An appellate attorney certain of securing an evidentiary hearing should do so; but, if no hearing is obtained, he should not raise the issue in his appellant's brief. If the issue is decided by the appellate court on the merits, almost certainly against the defendant, *res judicata* will effectively bar relitigation on a post-conviction petition far more assuredly than would waiver for failure to raise the issue on appeal.

IV. CONCLUSION: A SUGGESTION TO THE COURTS

The problem described here is a classic example of rules founded in reason gradually becoming senseless dogma. There is generally good reason for the lack of a right to an evidentiary hearing pursuant to trial rule 59. The motion to correct error is properly an opportunity for the trial judge, after the heat of battle, to reexamine rulings made at trial and to correct his own mistakes.⁶¹ No evidentiary hearing is usually needed because the nature of the inquiry, primarily legal, does not demand it.

It is with equally good reason that post-conviction proceedings are "not a substitute for direct appeal," or a "super appeal." Principles of finality, economy of legal resources, and the orderly resolution of direct appeal issues before the resolution of collateral issues support the principle of waiver.⁶² However, when these rules combine to deny an individual the ability to prove the infringement of a constitutional right, the rules must change.

⁶⁰*Langley v. State*, 256 Ind. at 207, 267 N.E.2d at 542. The fact that both the appellate lawyer and the post-conviction lawyer (who is raising the justification argument) believe in the futility of direct appeal litigation strengthens the argument made to the post-conviction judge.

⁶¹See BAGNI, GIDDINGS, STROUD, *INDIANA PRACTICE*, 4A, § 21 (1979).

⁶²256 Ind. at 199, 267 N.E.2d at 538.

Because trial rule 59 applies to civil as well as criminal proceedings, the consequences of making an exception to that rule could become unmanageable. The cleanest way to resolve this situation would be to declare that because an evidentiary hearing is necessary to afford a litigant a fair chance at meeting his burden of proof, the ineffective counsel issue cannot be adequately litigated in the motion to correct error-direct appeal forum. If that is admitted, the Rule P.C.1 section 1(b) language stating that a post-conviction proceeding is not a substitute for direct appeal ceases to be applicable to ineffective assistance claims because it is not an issue that can be adequately handled within the framework of direct appeal.

Allowing all ineffective assistance claims to be litigated in post-conviction proceedings would not necessarily result in more hearings. *Strickland* identified two components to an ineffective assistance claim: inadequacy and prejudice.⁶³ The *Strickland* court stated that the components could be decided in any order.⁶⁴ Some inadequacy claims rest on allegations which, even if true, are neither indicia of incompetence, nor could they have prejudiced the claimant. Rule P.C.1 section 4(f) provides that an evidentiary hearing is necessary only on issues of material fact.⁶⁵ If a court, assuming the facts to be true, found a lack of prejudice, or found the facts did not indicate incompetency, no hearing would be needed because the disputed facts would cease to be material.⁶⁶ For example, a claim that the lawyer did not object to the admission of gruesome photographs would not indicate incompetence if the photographs were admissible. A lawyer's failure to interview a defense witness *might* support an ineffective assistance claim if the lawyer had no reasonable basis for his omission, but harmless if the witness' testimony would not have added materially to the defense.

By allowing all ineffectiveness of counsel claims to be litigated in the Rule P.C.1 forum, two benefits could be realized. Under the summary judgment analysis of the prejudice component, meritless claims could be disposed of without the judicial cost of an evidentiary hearing; all meritorious claims would receive a hearing.

⁶³104 S. Ct. at 2064.

⁶⁴*Id.* at 2069.

⁶⁵IND. RULE OF PROCEDURE FOR POST-CONVICTION REMEDIES 1 § 4(f): "The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact"

⁶⁶Although proving prejudice could involve questions of fact, in most cases the facts would be subject to proof by depositions, answers to interrogatories, and affidavits. To this author's knowledge, this "summary judgment" approach to ineffective assistance claims is not being used, although the rules exist which permit it.

The present inequitable situation cannot continue. The appellate courts engender no respect by requiring a type and quantum of proof that can only be gathered through an evidentiary hearing, and then denying that necessary hearing to some litigants on a basis not connected to the merits.

Antenuptial Agreements After *In re Marriage of Boren*

DAVID B. HUGHES*

Persons contemplating a second marriage, or persons of substantial worth contemplating a first marriage, from time to time seek counsel from attorneys concerning the nature and validity of an antenuptial agreement, also commonly referred to as a pre-nuptial agreement. Interest in such agreements has increased in recent years as the incidence of marriage dissolutions has risen. Until recently, however, there has been considerable question about the efficacy and enforceability of such agreements in the event of a dissolution of marriage under Indiana's Dissolution of Marriage Act.¹

This Article will briefly explore the confusion that has existed in Indiana concerning antenuptial agreements during approximately the past ten years. Following will be an analysis of *In re Marriage of Boren*,² the recent decision of the Supreme Court of Indiana which has substantially clarified the law. The Article will then conclude with a discussion of the practical aspects which counsel for a prospective husband and wife should consider in contemplating the negotiation and execution of an antenuptial agreement.

I. A BRIEF OVERVIEW OF PRE-*Boren* INDIANA LAW

Antenuptial agreements have been favored for centuries, and since 1889, the Supreme Court of Indiana has enunciated the proposition that courts should not be allowed to set aside such contracts fairly made between consenting parties.³ In *McNutt v. McNutt*,⁴ the supreme court held concerning the binding nature of antenuptial agreements:

It is indeed difficult to find any principle upon which courts can set aside contracts made in good faith, with due deliberation, and by persons of mature age, even though that contract be one between a man and a woman contemplating marriage. It is stretching, as many of the authorities suggest, the power of the courts a great ways to declare that a man and a woman may not, even though the latter has no estate of her own, make their

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¹IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

²475 N.E.2d 690 (Ind. 1985).

³*McNutt v. McNutt*, 116 Ind. 545, 19 N.E. 115 (1888).

⁴*Id.*

own contracts. In earlier ages there was, perhaps, some reason for the old English law rule, for women were not educated then as now, and were far more under the dominion of the men than in these ages. The reason for the rule has failed, and where the "reason faileth the rule faileth."

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From the earliest years of the law, the courts of chancery, rejecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been engrafted into the body of American jurisprudence. . . . To remove all claims to each other's property was, it is very plain, the leading purpose of the parties, and the court would do wrong to frustrate that purpose. The contract has long existed, has been acted upon, one of the parties is dead, and the courts can not do otherwise than read the contract as the parties wrote it, and as they intended it should be read.⁵

Nine years later in *Buffington v. Buffington*,⁶ the court expanded on the policy of the *McNutt* decision by stating that antenuptial agreements are favored by the law in that they promote domestic happiness. Consequently, courts should ascertain and give effect to the intention of the parties to such agreements. The court stated:

It is the firmly-established rule in this state that antenuptial contracts are not in such disfavor as to require rigid construction. On the contrary, they are favored by the law as promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation. No formality is required, and the rule of construction is to ascertain and give effect to the intention of the parties.⁷

Approximately fifteen years later in the case of *Mallow v. Eastes*,⁸ the court expanded upon the principles previously enunciated in *McNutt* and *Buffington* to make it clear that trial courts should not attempt to substitute their judgment for the intentions of the contracting parties, even in situations where the complaining spouse's agreement left her destitute. The court said:

Our courts have uniformly upheld antenuptial contracts where fairly entered into, even though the effect be to leave the surviving

⁵*Id.* at 549, 558-59, 19 N.E. at 117, 122.

⁶151 Ind. 200, 51 N.E. 328 (1898).

⁷*Id.* at 202, 51 N.E. at 329.

⁸179 Ind. 267, 100 N.E. 836 (1913).

wife very little, based upon the motives of marriage not being mercenary, but of the highest consideration in itself, and holding, under such contracts, that the considerations fixed by the parties will be deemed sufficient, even though the provisions for the contemplated wife be much less than the statutory right of widows, or even gives her no property interest.⁹

The supreme court's liberal construction of antenuptial agreements is evidenced by its statement that no particular form of words is required for a valid antenuptial agreement.¹⁰ In *McNutt v. McNutt* the court stated:

No particular form of words is necessary to constitute a valid antenuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifested, and it is such as can, at law or in equity, be executed. . . . In truth, not only do the authorities affirm that no formality is required, but they go further, and declare that such contracts are to be construed with liberality and favor. They will be upheld if possible, and not overthrown unless the necessity leading to that result is imperious. . . . Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property.¹¹

The above decisions of the Indiana Supreme Court remain good law. The public policy of Indiana as expressed by the supreme court has, therefore, been to favor antenuptial agreements because they tend to promote marital harmony and eliminate unnecessary litigation. Accordingly, where such agreements have been fairly entered into, the contracts have been uniformly upheld and liberally interpreted to effect the intention of the parties.

Throughout the years, the courts of appeals of Indiana have either expressly or by implication embraced the supreme court's rulings on antenuptial agreements.¹² The following language from *Estate of Gillilan v. Estate of Gillilan*¹³ is illustrative of the thrust of the prior holdings of the courts of appeals concerning antenuptial agreements:

⁹*Id.* at 274, 100 N.E. at 839.

¹⁰*McNutt v. McNutt*, 116 Ind. 545, 19 N.E. 115 (1888).

¹¹*Id.* at 557-58, 19 N.E. at 121.

¹²*See, e.g., Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baughner v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957); *Roush v. Hullinger*, 119 Ind. App. 342, 86 N.E.2d 714 (1949); *Moore v. Harrison*, 26 Ind. App. 408, 59 N.E. 1077 (1901).

¹³406 N.E.2d 981 (Ind. Ct. App. 1980).

In considering an antenuptial agreement we are cognizant of certain well recognized principles of law which are applicable. It is settled that antenuptial contracts entered into between an adult husband and adult wife in contemplation of marriage are favored by the law in that they tend to promote domestic happiness and adjust property questions which might otherwise become the source of much litigation, and, as often pointed out, the marriage itself is the consideration for such agreements which perhaps may be the most valuable and highly respected consideration of the law. No formality is required, and such agreements are given a liberal rather than a strict construction, and a construction will be given in each case giving effect, if possible, to the intention of the parties.¹⁴

The longstanding public policy of Indiana favoring antenuptial agreements has also been incorporated into the statutory law respecting probate estates. Two sections of the Indiana Probate Code are applicable to antenuptial and postnuptial agreements: the provision concerning waiver of the right to elect against a spouse's will,¹⁵ and the section which provides for waiver of a beneficiary's expectancy.¹⁶ The former provision states:

The right of election of a surviving spouse hereinbefore given may be waived before *or after* marriage by a written contract, agreement or waiver, signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given such party is a fair consideration under all the circumstances. The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage.¹⁷

The Indiana Code also provides that a spouse may waive the right to take an intestate share in a writing:

The intestate share or other expectancy which the spouse or any other heir may be entitled to may be waived at any time by a written contract, agreement or waiver signed by the party waiving such share or expectancy. *The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage.* . . . Except as otherwise provided therein, such waiver executed by the decedent's spouse

¹⁴*Id.* at 988.

¹⁵IND. CODE § 29-1-3-6 (1982).

¹⁶*Id.* § 29-1-2-13 (1982).

¹⁷*Id.* § 29-1-3-6 (1982) (emphasis added).

shall be deemed a waiver of the right to elect to take against the decedent's will and the written contract, agreement, or waiver may be filed in the same manner as is provided in this article for the filing of an election.¹⁸

The cases construing these two sections of the Probate Code have unanimously upheld them.¹⁹ With respect to property distributions upon the death of a spouse, antenuptial agreements have been uniformly enforced according to their terms so long as fraud or duress has not been practiced upon the surviving spouse.²⁰ Consequently, in Indiana the surviving spouse has not been permitted to litigate the validity of an antenuptial agreement on the grounds that it is unfair or inequitable.

Most of the Indiana case law during the past century concerning antenuptial agreements arose in the probate area.²¹ In the past twenty years, however, the courts have often considered the enforcement of antenuptial agreements in the context of divorce.²² The old mores of society with regard to division of labor among the sexes and the consequential dominant role of the male in marriage and society resulted in the reluctance of many courts to recognize certain parts of antenuptial agreements in divorce cases.²³ These courts were generally concerned

¹⁸*Id.* § 29-1-2-13 (1982) (emphasis added).

¹⁹For examples of cases affirming IND. CODE § 29-1-3-6, see *Russell v. Walz*, 458 N.E.2d 1172 (Ind. Ct. App. 1984); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *Baughner v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957). For examples of cases affirming IND. CODE § 29-1-2-13, see *Russell v. Walz*, 458 N.E.2d 1172 (Ind. Ct. App. 1984); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind. Ct. App. 1980); *Johnston v. Johnston*, 134 Ind. App. 351, 184 N.E.2d 651 (1962); *McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962).

²⁰*See, e.g., McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baughner v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957).

²¹*See, e.g., McClain's Estate v. McClain*, 133 Ind. App. 645, 183 N.E.2d 842 (1962); *Baughner v. Barrett*, 128 Ind. App. 233, 145 N.E.2d 297 (1957).

²²*See, e.g., LeFevers v. LeFevers*, 240 Ark. 992, 403 S.W.2d 65 (1966); *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976); *McHugh v. McHugh*, 181 Conn. 482, 436 A.2d 8 (1980); *Carnell v. Carnell*, 398 So. 2d 503 (Fla. Dist. Ct. App. 1981); *Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629 (1978); *Hafner v. Hafner*, 295 N.W.2d 567 (Minn. 1980); *Lamborn v. Lamborn*, 56 A.D.2d 623, 391 N.Y.S.2d 679 (1977).

²³*See, e.g., In re Marriage of Newman*, 44 Colo. App. 307, 616 P.2d 982 (1980) (provision in antenuptial agreement where spouse waives entitlement to maintenance is not binding; interspousal support obligation imposed by law cannot be contracted away); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973) (provisions of antenuptial agreements which prohibit alimony are void as against public policy); *see also Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983); *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288; *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); *cf. Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982) (where court modified antenuptial agreement in favor of husband where agreement provided that each spouse forfeited property rights in event of divorce). *But see Unander v. Unander*, 265 Or. 102, 506 P.2d

with whether parties contemplating marriage could legally contract with respect to a husband's recognized "duty to support his wife."²⁴ While the basis for such older decisions generally was not well articulated, the underlying rationale was that a husband who wished to terminate his "duty to support his wife" might have had a strong motive for seeking a divorce, thus leaving a wife entirely without adequate support.²⁵ In other words, courts had been of the opinion that a husband's duty to support his wife was an incident of marriage of such public importance that it could not be left to the parties to control by their antenuptial contracts.²⁶

The rationale of the earlier American cases has eroded dramatically during the last twenty years with the advent of "no fault" divorce statutes and dissolution acts, such as have been adopted in Indiana.²⁷ These statutes recognize the overwhelming incidence of divorce and, generally speaking, replace the "alimony/support" concept of divorce awards with "division of property" rules absent spousal disability.²⁸ The better reasoned American decisions of more recent vintage began to hold rather consistently that the terms and provisions of an antenuptial agreement with respect to property division must be enforced by divorce courts when the agreement was not induced through fraud, duress, or coercion.²⁹

719 (1973) (antenuptial agreement providing that no alimony shall be paid will be enforced unless spouse has no other reasonable source of support).

²⁴See, e.g., *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961) (husband cannot avoid duty of supporting wife by an antenuptial agreement); *accord Lindsay v. Lindsay*, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964) (husband may not absolve himself of obligation to support his wife); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970) (antenuptial agreement which relieves husband of duty to support wife is against public policy); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978) (antenuptial agreement cannot alter statutory obligation of husband to support wife); *cf. Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (forfeiture clause in antenuptial agreement where both spouses waived all right to alimony and support, temporary and permanent, if the marriage failed within seven years was an attempt to relieve other spouse of duty to support during marriage and was void); *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976) (provision in antenuptial agreement where husband fulfilled duty of support both during and after dissolution of the marriage by paying "alimony" was against public policy).

²⁵See, e.g., *Lindsay v. Lindsay*, 163 So. 2d 336 (Fla. Dist. Ct. App. 1964); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970).

²⁶See generally *Crouch v. Crouch*, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950); CLARK, LAW OF DOMESTIC RELATIONS 28-29 (1974); Annot., 57 A.L.R.2d 942 (1958).

²⁷IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

²⁸See, e.g., IND. CODE § 31-1-11.5-11 (Supp. 1985) (providing for equitably division of property in event of dissolution); *id.* § 31-1-11.5-11(e) (court may grant maintenance in event of spousal disability); *accord* DEL. CODE ANN. tit. 13, § 1513 (1981); *id.* § 1512; IDAHO CODE § 32-712 (1983); *id.* § 705; 23 PA. CONS. STAT. ANN. § 401 (Purdon Supp. 1985); *id.* § 501.

²⁹See, e.g., *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Posner v. Posner*, 233

The law in Indiana regarding antenuptial agreements remained relatively clear until 1976. The general consensus among practicing lawyers essentially was that antenuptial agreements professionally drafted and voluntarily executed by competent adults following a fair (if not full) disclosure, and preferably after review by independent counsel for both parties, were binding according to their terms whether the prospective marriage ended by death or divorce. Then in *Tomlinson v. Tomlinson*,³⁰ the court addressed the validity of an antenuptial agreement that predated the Dissolution of Marriage Act.³¹ *Tomlinson* arose from an appeal of a divorce decree. The antenuptial agreement at issue stated that in the event of divorce, the wife would not attempt to receive any property acquired by the husband prior to marriage. The court took note of the growing trend in America to recognize the validity and enforceability in dissolution proceedings of antenuptial agreements, if fairly entered, whether or not they dealt with property or support rights. The court of appeals then held that an antenuptial agreement which speaks to a proposed distribution in the event of divorce is not *per se* void as against public policy, but rather is presumed to be valid.³²

Tomlinson, however, contained dicta which seriously clouded Indiana law concerning the practical efficacy of antenuptial agreements in dissolution situations. The court stated:

However, such an agreement is not binding upon the court. Since circumstances existent at the time of divorce may be substantially different than those which existed at the time of the agreement, a valid agreement is but one factor to be considered among the several factors upon which the court customarily relies to make an equitable distribution of property. Here, the decision of the trial court to consider the antenuptial agreement was within these perimeters. We therefore find no error in the acceptance into evidence and the consideration of the antenuptial agreement.³³

So. 2d 381 (Fla. 1970); *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982); *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Frey v. Frey*, 298 Md. 552, 471 A.2d 705 (1984); *Marschall v. Marschall*, 195 N.J. Super. 16, 477 A.2d 833 (1984); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

³⁰170 Ind. App. 331, 352 N.E.2d 785 (1976).

³¹IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985). The court in *Tomlinson*, however, did not decide the issue whether an "after-acquired property" clause in antenuptial agreements was valid in a dissolution proceeding because the agreement in that case did not place a maximum limitation upon the husband's property settlement liability.

³²170 Ind. App. at 340, 352 N.E.2d at 791.

³³*Id.*

Such language apparently had its genesis in some dicta which appeared in the earlier case of *Flora v. Flora*.³⁴ In *Flora* the court stated that a trial court, pursuant to the Dissolution of Marriage Act,³⁵ has discretion to alter the disposition of a husband and wife's property notwithstanding a contrary agreement by the parties.³⁶ This dicta was employed by the court of appeals in a subsequent dissolution of marriage case, *Stockton v. Stockton*,³⁷ to support the proposition that a trial court has discretion to accept, reject, or modify property postnuptial "settlement agreements" subject only to review for abuse of discretion.³⁸

The question for lawyers then became whether or not the above dicta from *Tomlinson* authorized the exercise of discretion by a trial court in a dissolution case to discard selected provisions of an antenuptial agreement. Many lawyers felt that the abuse of discretion standard mentioned in *Tomlinson* and later applied in *Stockton* to postnuptial settlement agreements should not be applied to antenuptial agreements. There were several reasons for this conclusion. First, such a standard appeared to abrogate the age-old policy first expressed by the Indiana Supreme Court in *McNutt v. McNutt*³⁹ that antenuptial agreements were to be enforced according to their terms absent fraud. This abuse of discretion standard also violated the equally well-established principle that such agreements would be liberally construed to effectuate the clear intention of the parties.⁴⁰ Second, antenuptial and postnuptial separation agreements are wholly distinct in content and purpose, thus warranting different analysis by a reviewing court. Antenuptial agreements are intended as a means of preserving the status quo as to property interests existing before marriage and, in many instances (subject to the respective wishes of the contracting parties), to secure to each party the benefit of the growth and appreciation of that party's premarital assets. Separation agreements, on the other hand, resolve claims regarding property interests which have already matured because of the marriage status of the parties. In further contrast to separation agreements, antenuptial

³⁴166 Ind. App. 620, 337 N.E.2d 846 (1975).

³⁵IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

³⁶166 Ind. App. at 629, 337 N.E.2d at 851.

³⁷435 N.E.2d 586 (Ind. Ct. App. 1982).

³⁸The trial court's discretion in deciding whether to enforce an antenuptial agreement derives from specific language in the Indiana Code:

In an action for dissolution of marriage the terms of the agreement *if approved by the court* shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

IND. CODE § 31-1-11.5-10(b) (1982) (emphasis added).

³⁹116 Ind. 545, 19 N.E. 115 (1889).

⁴⁰See, e.g., *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970); *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976).

agreements are executory in nature until the marriage actually occurs and have as their principal consideration the marriage itself. Antenuptial agreements do not dispose of or divide any property, but, rather, they fix the rights of the parties with respect to the specified property and any consequential appreciation or accumulations regardless of the duration of the marriage. Consequently, antenuptial and postnuptial separation agreements should be analyzed differently by a reviewing court. A rule of law which permits a court at its discretion to enforce only selected provisions of an antenuptial agreement arguably would encourage dissolutions of marriage by offering the hope of financial reward to a spouse who anticipates that a trial court's exercise of "discretion" will result in a larger settlement than that specified in the antenuptial agreement. The confusion regarding the power of a reviewing court to alter antenuptial and postnuptial separation agreements was resolved in *In re Marriage of Boren*.⁴¹

II. THE PRESENT LAW IN LIGHT OF *In re Marriage of Boren*

On March 26, 1985, the Supreme Court of Indiana decided *In re Marriage of Boren*.⁴² *Boren* essentially ended the cloud created by the dicta that had appeared in *Tomlinson*,⁴³ *Flora*,⁴⁴ and *Stockton*,⁴⁵ and held that antenuptial agreements that are entered into fairly, and without fraud, coercion, or undue influence, and which are not otherwise unconscionable, must be honored and enforced, as written, by trial courts in dissolution matters.⁴⁶ The supreme court's decision thus vacated the 1983 decision by the court of appeals which had held that section 10(b) of the Dissolution of Marriage Act grants trial courts in dissolution cases the discretion to award a spouse a recovery that would otherwise be barred by the parties' antenuptial contract.⁴⁷

In *Boren*, the trial court had awarded the wife \$188,500 as a property settlement instead of the \$5,000 limit that had been set out in the antenuptial agreement as the maximum award upon the dissolution of marriage by divorce or death.⁴⁸ The husband was fifty-nine years of age at the time he proposed marriage to the wife, his first wife of over thirty years having recently died. The new wife was fifty-five years of age and had been married on three prior occasions. In 1969, she was

⁴¹475 N.E.2d 690 (Ind. 1985).

⁴²*Id.*

⁴³170 Ind. App. 331, 352 N.E.2d 785 (1976).

⁴⁴166 Ind. App. 620, 337 N.E.2d 846 (1975).

⁴⁵435 N.E.2d 586 (Ind. Ct. App. 1982).

⁴⁶475 N.E.2d at 694.

⁴⁷*Boren v. Boren*, 452 N.E.2d 452 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

⁴⁸*Id.* at 454.

managing a motel in Daytona Beach when the husband proposed to her and asked her to execute an antenuptial agreement. The agreement was signed six days prior to the marriage, upon the husband's insistence, even though the wife was reluctant to execute such an agreement. Nevertheless, the wife accepted the husband's proposal, liquidated her assets totaling approximately \$40,000, resigned her employment, and moved to Indiana. The agreement basically provided that each party would retain his or her premarital assets, and would also retain sole ownership and control of any property he or she acquired during marriage. Additionally, each party agreed to claim no part of the other's estate, except that the wife would be entitled to a cash settlement of \$5,000 either upon the termination of the marriage or upon the husband's death.

The parties married in 1969, and the wife filed her petition for dissolution of marriage on April 30, 1981. During the marriage, the husband had continued his farming operation, and the wife had maintained the household, including the performance of some tasks around the farm. At the time that the dissolution action was filed, the marital pot consisted of \$3,306,061.24, which contained a \$40,000 contribution from the wife. The remainder of the assets had been brought into the marriage by the husband, or inherited or earned by him during the marriage.

The judge of the circuit court at the dissolution trial determined that the agreement had been entered into fairly, voluntarily, and with adequate disclosure, but that the agreement could be modified by section 10(b) of the Act⁴⁹ by invalidating its provisions with respect to assets acquired after the marriage. The trial court awarded the wife \$183,500 in addition to the \$5,000 specifically provided by the terms of the antenuptial agreement.⁵⁰ The trial court further ordered the husband to pay \$12,000 for attorney fees and \$4,500 for the cost of appraising the marital property.⁵¹ The court of appeals then upheld the trial court's modification of the antenuptial agreement.⁵²

In vacating the judgment of the court of appeals, the Indiana Supreme Court held, "We cannot agree with the Court of Appeals' holding that the language of Ind. Code 31-1-11.5-10 (Burns 1980) precludes the trial court's being bound by a valid antenuptial agreement."⁵³ Indiana Code section 31-1-11.5-10 provides:

(a) To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant

⁴⁹IND. CODE § 31-1-11.5-10(b) (1982).

⁵⁰452 N.E.2d at 454.

⁵¹*Id.*

⁵²*Id.*

⁵³475 N.E.2d at 695.

upon the dissolution of their marriage, the parties may agree in writing to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them and the custody and support of their children.

(b) In an action for dissolution of the marriage the terms of the agreement if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

(c) The disposition of property settled by such an agreement and incorporated and merged into the decree shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.⁵⁴

The court continued its analysis as follows:

Apparently relying upon the words “if approved” in subsection (b), the Court of Appeals held that the trial judge has the discretion to accept, reject, or modify *all* agreements between the parties, without respect to when those agreements were made. We find, however, that the distinction between ante-nuptial agreements, i.e., those entered into in contemplation of marriage, and settlement agreements, i.e., those entered into as a consequence of dissolution proceedings, cannot be ignored and that the legislature, in enacting the Dissolution of Marriage Act, intended only to vest the trial court with discretion regarding post-nuptial agreements. The statute provides that the trial court may approve agreements entered into to settle disputes “between the parties to a marriage *attendant upon* the dissolution of their marriage.”⁵⁵

Thus, the supreme court recognized the ability of a trial court to modify settlement agreements, but rejected their ability to modify antenuptial agreements in a dissolution action. Consequently, to the extent that *Tomlinson*⁵⁶ and *Flora*⁵⁷ held otherwise, the supreme court disapproved them.⁵⁸ The court expressed its rationale for the decision, declaring, “Moreover, were we to construe Ind. Code 31-1-11.5-10 as did the Court of Appeals, a valid ante-nuptial agreement would be subject

⁵⁴IND. CODE § 31-1-11.5-10 (1982).

⁵⁵475 N.E.2d at 695 (emphasis added).

⁵⁶170 Ind. App. 331, 352 N.E.2d 785 (1976).

⁵⁷166 Ind. App. 620, 337 N.E.2d 846 (1975).

⁵⁸475 N.E.2d 690, 695 (Ind. 1985).

to one interpretation upon the death of a spouse and another upon the dissolution of a marriage. We see no logic in such a result.”⁵⁹

Accordingly, with the supreme court's decision in *Boren* the domestic relations lawyer can (at least in the foreseeable future) approach the draftsmanship of antenuptial agreements with a great deal more confidence than has been the case during the past decade. This is not to say that *Boren* has settled all issues that might arise in the future regarding antenuptial agreements in the context of dissolution actions, or to say that the legislature is powerless to affect the decision in *Boren* by legislative enactment. At least for the present, however, attorneys are not totally adrift when it comes to advising clients about the wisdom, practicality, and binding effect of properly drafted and fairly negotiated antenuptial agreements.

III. DRAFTSMANSHIP OF POST-*Boren* ANTENUPTIAL AGREEMENTS

Now, more than ever, it will be incumbent upon the draftsman of an antenuptial agreement to do all within his power to create a contract that is legally binding and enforceable in the event of the dissolution of marriage or the death of the parties. This is so because, now that *Boren* has removed from dissolution courts the power to “modify” antenuptial agreements on account of changed circumstances or other equitable considerations, courts no doubt will more often be urged to strike down the antenuptial agreement as invalid or unenforceable. With the focus, therefore, shifting from modification to invalidity, lawyers who draft unenforceable antenuptial agreements will have a lot of explaining to do to their clients and possibly to their malpractice carriers as well.

Certain considerations in the drafting of an antenuptial agreement hardly bear mention. The agreement should be discussed and negotiated by the prospective husband and wife well in advance of the proposed wedding. As one author has commented, an antenuptial agreement presented to and signed by the bride “as she is adjusting her veil” may be unenforceable as having been executed under coercive circumstances.⁶⁰ Equally important, each party should be represented by competent and independent counsel. The agreement itself should contain a “binding effect” clause specifically providing that the agreement binds not only the parties but also their respective heirs, devisees, legatees, administrators, executors, guardians, assigns, and successors in interest. The effective date of the agreement should be expressed as the date upon which the parties solemnize their marriage. The agreement should then

⁵⁹*Id.* at 696.

⁶⁰Pantzer, *Inter-vivos Agreements between Spouses for Disposition of Assets on Death*, in *FAMILY LAW PRACTICE* (1974).

be solemnized by signatures affixed before a notary public containing an acknowledgment that each party understands the agreement, signs it voluntarily, and wishes to be bound by its provisions. It is also prudent for each attorney to attach his certificate attesting both that he has fully advised his client of his or her rights and obligations under the agreement and has also received from his client an express acknowledgment of the truth of the statements made by the client to the notary public. Additionally, it is prudent to provide that the parties may, by mutual agreement in writing, amend, revoke, or rescind the antenuptial agreement. It should also be kept in mind that the parties may move from Indiana to another jurisdiction with a different law regarding antenuptial agreements. It is possible to anticipate such a situation with the following clause:

The domicile of the parties at the time this agreement is written and executed is the State of Indiana, and the law of such state shall govern. The parties recognize that they may change their domicile to another jurisdiction by agreement. If they do so, they shall consult an attorney conversant with the property law of such new jurisdiction and shall amend this agreement, if necessary, so as to coordinate as nearly as possible the intention of this agreement with the law of the new jurisdiction.

The agreement must specify how the respective property of the parties will be affected by the marriage and subsequent dissolution of marriage or death of either party. Furthermore, the prospective husband and wife should use their own judgment about the property provisions to be included in the antenuptial agreement. In this author's view, a full disclosure of the property of each party is essential to the validity of an antenuptial agreement. Therefore, the agreement itself must make adequate reference to the property owned presently by each spouse. The attorney representing the party with the greater net worth must insure that his client's disclosure of net worth is reasonably accurate in order to avoid litigation over the validity of the agreement.⁶¹

When determining how the parties' property ownership will be affected by the marriage, a threshold issue is whether there will be any transfer of properties between parties at the inception of the marriage, or whether the property brought into the marriage by each party will remain entirely his or her individual property. The antenuptial agreement should contain a provision regarding how the parties are going to support themselves and pay family expenses during the marriage. If both parties

⁶¹Indeed, unless the draftsman is competent to calculate net worth of an individual of substantial means, it is this author's opinion that the task should be delegated to a certified public accountant.

have independent means of support, this should be stated in the agreement, even if the parties intend for one of them to provide support and maintenance for the other during the course of the marriage.

In addition to addressing the disposition of property brought into the marriage, the antenuptial agreement should also address the disposition of after-acquired property, unless the parties, through their negotiations, intentionally determine to make no provision therefor. In the latter event, the property acquired by the parties during the marriage will not be covered by the antenuptial agreement and, in the event of a later dissolution of marriage, the trial court clearly would be entitled to consider after-acquired property of both parties as being in the marital "pot." If, however, the parties decide to address after-acquired property in the antenuptial agreement, there are several alternatives. They could state that neither party shall have an interest in the other party's after-acquired property, or each spouse could be given complete ownership of the other spouse's after-acquired property, or there could be any variation between these two extremes. Further, as parties acquire title to property after marriage in various forms, the draftsman should consider provisions which adequately anticipate the effect of these forms. For example, the draftsman should consider the consequences of jointly owned real and personal property and assets that are disposed of by beneficiary designation, such as life insurance, company benefit plans, and IRA's.

In light of the supreme court's decision in *Boren*, the draftsman should also consider the effects of including a modest pecuniary benefit to an intended spouse upon dissolution or death. In *Boren*, the antenuptial agreement simply gave the wife the sum of \$5,000 from the husband's substantial estate in the event of either a dissolution of marriage or his death. Although the *Boren* marriage lasted more than twelve years, and Mr. Boren's estate had appreciated significantly, the trial court nevertheless found that the antenuptial agreement was fair and equitable, even though it attempted to modify the agreement by placing all post-marriage property in the marital pot.⁶² If the trial court had anticipated the eventual reversal of the case on appeal, it is conceivable that it would not have found the agreement fair and equitable in its original findings. Accordingly, it cannot be assumed from a reading of *Boren* that one party who has superior net worth always will be safe in providing an exceedingly modest pecuniary benefit to his intended spouse upon dissolution or death.

While this author would not flatly state that an antenuptial agreement could not provide for a modest lump sum amount regardless of how

⁶²*Boren v. Boren*, 452 N.E.2d 452, 454 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

long the marriage lasts, it would be wiser to provide for incremental increases as the marriage endures for the benefit of the party with the lesser net worth. The more difficult question is what guideline to follow in providing for incremental increases. One approach is to attempt to discern from one's trial experience the best result that one might achieve in the absence of an antenuptial agreement for the party with the greater net worth in the event of a dissolution at a given point in the marriage, and to provide the other party with an incremental sum at that point in time in the area of the forecasted amount or somewhat lower. Such an approach requires guesswork because the assets of the party with the greater net worth are subject to fluctuation in value. Whatever approach to this issue the draftsman takes, the amount awarded upon a dissolution of marriage to a spouse with the lesser net worth should be no different from the amount he or she would receive upon the death of the spouse. If the marriage thrives and one party wants to give a larger benefit to the spouse upon death than the antenuptial agreement would provide, this could be accomplished by rearranging property interests that would otherwise pass to the surviving spouse outside of the will.

Two other matters should be addressed in the antenuptial agreement where applicable. An earlier portion of this Article mentioned the statutory right of a surviving spouse to waive his or her right to elect against a spouse's will and to waive his or her right to an intestate share.⁶³ If the parties agree that such rights are to be relinquished, then specific reference to such relinquishment must be made in the antenuptial agreement. Additionally, it is quite common during the marriage of parties who have executed an antenuptial agreement to make gifts to one another. This eventuality should be expressly provided for in the antenuptial agreement so that it cannot later be claimed that such gifts constitute a modification or amendment of the agreement.

Another issue that must be addressed when drafting an antenuptial agreement is the validity of various provisions purporting to waive certain spousal obligations. These obligations include the legal duty of one party to support the other, the obligation of support *pendente lite*, and the obligation of post-dissolution support for an incapacitated spouse. Various state courts have addressed the issue of whether an antenuptial agreement can alter what would otherwise would be the legal duty of one party to support the other. This issue remains unsettled, however, in Indiana. Appellate courts in California, Colorado, Connecticut, Illinois, Iowa, and Ohio have limited antenuptial agreements to property rights only and have held that any waiver of support rights is against public policy and, hence, void.⁶⁴ The applicability of this law to Indiana

⁶³See *supra* notes 15-18 and accompanying text.

⁶⁴*In re Nelson's Estate*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964) (antenuptial

is questionable, however, because certain of these jurisdictions provide for alimony in addition to property settlement;⁶⁵ Indiana, on the other hand, is essentially a property division state.⁶⁶

A related question is whether or not the right of support *pendente lite* could be waived by a spouse in an antenuptial agreement or whether, for example, sums paid for such support could be credited against the amount the needy spouse is entitled to receive upon the dissolution of the marriage. While this author is not prepared to say that such agreements would be unenforceable per se, the wisdom of such a clause in an antenuptial agreement is doubtful, particularly where the spouse with the greater income and/or net worth would be exceedingly capable of providing needed support *pendente lite*.

A waiver issue of greater significance is whether an antenuptial agreement could provide for a waiver and relinquishment of a spouse's statutory right under section 11(d) of the Dissolution of Marriage Act⁶⁷ to seek post-dissolution support where he or she is physically or mentally incapacitated or in need of "rehabilitative maintenance." This issue probably has not been foreclosed by the decision in *Boren*⁶⁸ because no waiver provision was at issue in the case. Several views are possible on this issue. Cases from jurisdictions which permit a waiver of property rights but prohibit a waiver of support rights as being against public policy could be raised to support the position that antenuptial agreements cannot divest a dissolution court of the "right" to provide for post-

agreement invalid where spouse agreed not to seek alimony or support in event of divorce as contrary to public policy); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) (maintenance provision in an antenuptial agreement may be voidable for unconscionability at the time of marriage dissolution); *McNugh v. McNugh*, 181 Conn. 482, 436 A.2d 8 (1980) (antenuptial agreement providing that spouse would not be liable for support of children upon dissolution marriage held invalid); *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (antenuptial agreements attempting to regulate or modify husband's statutory duty of support will be analyzed upon a case by case basis and upheld if fair and reasonable); *In re Marriage of Gudenkauf*, 204 N.W.2d 586 (Iowa 1973) (antenuptial agreement which is assumed by the parties to prohibit alimony is contrary to public policy and, hence, void); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970) (antenuptial provision prohibiting a wife, separated without just cause, from receiving separate maintenance was void as against public policy); *Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984) (antenuptial agreements containing provisions for the disposition of property and monetary amounts of alimony are valid as long as the terms do not promote divorce).

⁶⁵See, e.g., CAL. CIVIL CODE § 4800 (West Supp. 1985) (provides for division of community and quasi-community property in event of dissolution); *id.* § 4801 (court may also order one party to pay support for the other); OHIO REV. CODE ANN. § 3105.63 (Page 1980) (petition for dissolution of marriage shall incorporate a separation agreement providing for division of all property and alimony).

⁶⁶IND. CODE § 31-1-11.5-11 (Supp. 1985).

⁶⁷*Id.* § 31-1-11.5-11(d) (Supp. 1985).

⁶⁸*In re Marriage of Boren*, 475 N.E.2d 690 (Ind. 1985).

dissolution maintenance.⁶⁹ However, Indiana's probate and dissolution statutes⁷⁰ arguably indicate that there is no sound reason why a spouse cannot waive post-dissolution support rights in a properly drafted antenuptial agreement. There is no provision in the Probate Code whereby a widow who has waived the right to elect against the will or waived the right to an expectancy can recoup rights she would have had as a surviving spouse but for waiver provisions. Widows are as apt to be physically or mentally incapacitated, or as much in need of rehabilitative maintenance, as spouses in dissolution proceedings. Accordingly, as long as the probate law of Indiana makes no special provision for incapacitated widows, it could be argued that a dissolution trial court should have no greater power. Stated another way, there is no reason to extend greater rights to a spouse whose marriage ends in divorce than Indiana extends to a spouse who remains happily married until the death of his or her partner.

Another issue as yet undecided in Indiana is whether an antenuptial agreement can divest a dissolution court of the power it presently has under section 16 of the Act to order a party to pay reasonable amounts for attorney's fees, expert witness fees, appraisal costs, and the like.⁷¹ In *Boren*, the trial court made a substantial award of attorney's fees and litigation costs notwithstanding the limitation in the antenuptial agreement that the wife would receive only \$5,000 upon a dissolution of marriage.⁷² Such result, however, does not constitute a holding by the court that these costs are recoverable in every case regardless of the provisions of the subject antenuptial agreement. In *Boren*, no statement was made in the agreement that the \$5,000 limitation covered attorney's fees and litigation costs in the event of dissolution. The issue, therefore, remains whether an antenuptial agreement can expressly divest a dissolution court of the power to award costs and attorney's fees under section 16 of the Act. The attorney representing the party with the greater net worth perhaps should negotiate the inclusion of such a waiver provision in an antenuptial agreement. If no such provision appears in the agreement, its absence is an invitation to a substantial contest in a dissolution proceeding as to the validity of the antenuptial agreement. Stated another way, if the antenuptial agreement contains no clause expressly providing that section 16 costs are either waived or are to be credited against the amount to be received by the spouse who receives

⁶⁹See *supra* note 64.

⁷⁰See IND. CODE § 29-1-2-13 (1982); IND. CODE § 29-1-3-6 (1982); IND. CODE §§ 31-1-11.5-1 to -26 (1982 & Supp. 1985).

⁷¹IND. CODE § 31-1-11.5-16 (Supp. 1985).

⁷²*Boren v. Boren*, 452 N.E.2d 452, 454-55 (Ind. Ct. App. 1983), *vacated*, 475 N.E.2d 690 (Ind. 1985).

a payment, the decision in *Boren* means that attorney's fees and other litigation costs are recoverable in addition to any sum provided by the antenuptial agreement. As a consequence, any drawn-out litigation over the validity of an antenuptial agreement will substantially increase the cost of the dissolution proceeding to the party with the greater net worth.

A final question to be addressed in this Article is the validity of post-marriage (but pre-dissolution action) agreements. It appears that Indiana has never addressed the validity of such agreements, and there is little recent law on the subject. Postnuptial agreements are expressly authorized by the Indiana Probate Code,⁷³ but the question of the efficacy of such an agreement in the event of a dissolution remains. The principal issue concerning such agreements is whether there is adequate consideration to support the agreement. Where the agreement is made before marriage, Indiana law makes clear that the marriage itself is the consideration for such an agreement "which, perhaps, may be the most valuable and highly respected consideration of the law."⁷⁴ If the marriage has already taken place, and if one spouse has a much greater net worth than the other, what amount of consideration will it take for the other spouse to surrender a substantial portion of her interest in the other's estate? This question ultimately boils down to one of fairness under all of the circumstances, and no particular guidelines seem to be available to provide an answer to the question. The best solution is avoiding the problem by entering an antenuptial agreement prior to marriage. If it is too late for that, it would be prudent for the draftsman representing the spouse with the greater net worth to make a significant present transfer at the time the agreement is executed, either outright or in trust. This is true because the present value of a significant sum to be received a number of years hence can be a reasonable amount. Furthermore, many people still are inclined to abide by their written agreements, so the fact that the agreement may later not be upheld is not a sufficient reason, standing alone, to avoid drafting it in the first instance.

IV. CONCLUSION AND FINAL OBSERVATIONS

Antenuptial agreements are a favorite of the law and are liberally construed to effect the parties' intentions. Prior to *In re Marriage of Boren*, however, various Indiana cases contained dicta that, in the context of divorce, courts could modify selected provisions of an antenuptial agreement. The Supreme Court of Indiana resolved this question in *Boren* when it held that antenuptial agreements that are entered into fairly, without fraud and coercion, and are not otherwise unconscionable,

⁷³IND. CODE § 29-1-3-6 (1982).

⁷⁴Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind. Ct. App. 1980).

must be enforced as written by trial courts in dissolution matters. Thus, the need for a properly drafted enforceable antenuptial agreement of substantial benefit to one's client becomes paramount.

The burden on the party contesting the antenuptial agreement is great.⁷⁵ He or she must prove that the agreement was not executed voluntarily or that, before execution of the agreement, he or she was not provided a fair and reasonable disclosure of the property or financial obligations of the other party and did not have, or reasonably could not have had, adequate knowledge of such property or obligations. It would also be the burden of such party to show that the agreement was unconscionable when it was executed even in the event the disclosures made were less than accurate.

⁷⁵*Flora v. Flora*, 166 Ind. App. 620, 630, 337 N.E.2d 846, 851 (1975).

Legislative Developments in Family Law

MOLLY P. RUCKER*

I. GRANDPARENTAL VISITATION

Numerous states have enacted grandparental visitation statutes in recent years to deal with the situation where divorce or death of a parent has removed direct contact between grandparents and grandchildren.¹ The Indiana grandparental visitation statute was enacted in 1981.² Prior to its passage, the Indiana courts had recognized the propriety of giving grandparents a right to visitation³ but had indicated that any visitation privileges the grandparents might have would be terminated by a final decree of adoption.⁴ The 1981 legislation did not specifically address the effects of adoption on grandparental visitation.

Several cases decided under the 1981 legislation held that adoption precluded grandparents from seeking visitation⁵ and would also terminate any visitation rights granted prior to the adoption.⁶ The grandparental visitation provisions of the Indiana Code were amended in 1985 to deal with the problems created by the adoption of the grandchild by a stepparent.⁷ The amendment expressly states that grandparental visitation rights survive the adoption of a grandchild by a stepparent.⁸

The amendment does not resolve the problems concerning visitation when a grandparent wishes to seek visitation while both parents of the grandchild are living and have not divorced.⁹ The amendment also fails to address the visitation rights of a paternal grandparent when the paternity of a child born out of wedlock has not been established.¹⁰ In addressing these situations, the Indiana courts have indicated that extending visitation rights beyond those specifically provided for in the statute should be left to the legislature and not to the courts.¹¹ Because the legislature did not address these two situations in the 1985 amendment, the opinions denying visitation are still the law in Indiana.

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¹*E.g.*, MICH. COMP. LAWS § 722.27b (Supp. 1985); N.Y. DOM. REL. LAW § 72 (McKinney 1977); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1984-1985).

²IND. CODE § 31-1-11.7-2 (1982).

³Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. Ct. App. 1981).

⁴*Id.* at 1021 n.6.

⁵Lipinski v. Lipinski, 476 N.E.2d 924 (Ind. Ct. App. 1985).

⁶*In re* Visitation of Menzie, 469 N.E.2d 1225 (Ind. Ct. App. 1984).

⁷Act of September 1, 1985, Pub. L. No. 281-1985, 1985 Ind. Acts 305.

⁸IND. CODE § 31-1-11.7-2 (Supp. 1985).

⁹Matter of Meek, 443 N.E.2d 890 (Ind. Ct. App. 1983).

¹⁰*In re* Visitation of J.O., 441 N.E.2d 991 (Ind. Ct. App. 1982).

¹¹*Id.* at 994 n.1.

II. CHANGING THE RESIDENCE OF AN UNEMANCIPATED CHILD

In a 1974 opinion, the Indiana Supreme Court held that a custodial parent could change the residence of a child only with prior judicial sanction.¹² The Indiana General Assembly has now codified the requirement of prior judicial sanction for moving the child's residence.¹³ A custodial parent who intends to move to a residence outside Indiana or one hundred miles or more from the residence at the time of the decree must file a notice of intent with the court that issued the original custody order.¹⁴ The custodial parent must also notify the noncustodial parent if the noncustodial parent has visitation rights.¹⁵ Either parent can then request a hearing for the purpose of reviewing and, if appropriate, modifying the custody, visitation, and support orders.¹⁶ The court must consider the change of residence as a factor in deciding whether the custody, support, and visitation orders should be modified.¹⁷ Thus, in addition to codifying the requirement of prior judicial sanction for a residence change, the statute also significantly broadens the use of change of residence as a ground for changes in custody, visitation, and support.

III. ENFORCEMENT OF CHILD SUPPORT

The United States Congress strengthened the Title IV-D child support enforcement and paternity establishment provisions of the Social Security Act¹⁸ by adopting the Child Support Enforcement Amendments of 1984 (CSEA).¹⁹ The amendments primarily affect the states by increasing the obligations of states in the handling of IV-D cases. The amendments require that each state enact all laws necessary to implement the procedures and enforcement mechanisms outlined in the act.²⁰ The enforcement mechanisms available under CSEA include wage withholding,²¹ imposition of bonds,²² liens on real and personal property,²³ interception of federal²⁴ and state²⁵ income tax refunds, and provision of support arrearage information to consumer reporting agencies.²⁶

¹²Marshall v. Reeves, 262 Ind. 107, 311 N.E.2d 807 (1974).

¹³Act of Sept. 1, 1985, Pub. L. No. 278-1985, 1985 Ind. Acts 305.

¹⁴IND. CODE § 31-1-11.5-21.1(a).

¹⁵*Id.*

¹⁶*Id.* § 31-1-11.5-21.1(b).

¹⁷*Id.*

¹⁸42 U.S.C. §§ 651-667 (1982).

¹⁹Pub. L. No. 98-378, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1305.

²⁰42 U.S.C.A. § 654(20) (West. Supp. 1985).

²¹*Id.* § 666(b).

²²*Id.* § 666(a)(6).

²³*Id.* § 666(a)(4).

²⁴*Id.* § 664.

²⁵*Id.* § 666(a)(3)(a).

²⁶*Id.* § 666(a)(7).

The Indiana legislature has enacted new code provisions and amended existing provisions to bring Indiana law into conformity with these new federal requirements.²⁷ This legislation affects custodial parents who are not receiving Aid to Families with Dependent Children (AFDC) as well as those parents who are receiving such assistance. Private attorneys may now refer their non-AFDC clients to the IV-D agency (the county prosecutor) for support enforcement services.

Remedies available for support enforcement have been greatly expanded. When a court establishes, modifies, or enforces an order for child support, the court must now also enter a separate income withholding order which must be activated by the IV-D agency when the support obligor is one month delinquent in support payments.²⁸ The order may also be activated upon petition to the court by the person entitled to receive the child support.²⁹ The only prerequisites to activation of the income withholding order are notice to the support obligor³⁰ and to the income payor.³¹ The support obligor may also request activation of the income withholding order.³² The support obligor may contest the nonconsensual activation of the income withholding order within twenty days after the notice is mailed.³³ However, the only basis for contesting the activation of the order is a mistake of fact.³⁴ If the order is not contested, it may become effective at the end of the twenty-day period.³⁵

Once an income withholding order has been activated, a number of obligations are imposed upon the income payor. The payor may withhold a fee of two dollars from the obligor's income each time income is forwarded to the clerk of court.³⁶ If the income payor fails to forward the funds as required by the income withholding order, the payor is liable for the amounts not forwarded.³⁷ The legislation also provides that a support obligor who has been discharged from employment, refused employment, or disciplined because of the income withholding order may bring a civil action against the income payor.³⁸ The obligor is entitled to recover an amount of not less than one hundred dollars, and

²⁷Act of Sept. 1, 1985, Pub. L. No. 53-1985, 1985 Ind. Acts 26.

²⁸IND. CODE §§ 31-2-10-7, -8 (Supp. 1985).

²⁹*Id.* § 31-2-10-8(b)(2).

³⁰*Id.* § 31-2-10-9.

³¹*Id.* § 31-2-10-12.

³²*Id.* § 31-2-10-8(b)(1).

³³*Id.* § 31-2-10-13. The time period for contesting the activation of the support order may be less than twenty days if a petition to activate the order has been filed by the person entitled to receive the support. *Id.* § 31-2-10-10.

³⁴*Id.* §§ 31-2-10-10(a)(6), -13(b).

³⁵*Id.* § 31-2-10-16(b).

³⁷*Id.* § 31-2-10-19.

³⁸*Id.* § 31-2-10-20.

this remedy does not affect any other legal remedies the obligor may have against the payor.³⁹

Other changes implemented by the recent legislation allow for the creation of liens against the real and personal property of a support obligor who is delinquent in payments.⁴⁰ The lien holder has the priority of an unperfected secured creditor in any enforcement proceedings against the property.⁴¹ The new legislation also makes support arrearage information available to consumer reporting agencies requesting the information.⁴²

These new support enforcement mechanisms supplement the remedies already available under Indiana law, including imposition of bonds as security for payment of support⁴³ and interception of federal and state income tax refunds.⁴⁴ The new legislation, in conjunction with these existing provisions, should provide for more efficient enforcement of support orders, and cooperation with county agencies should make it easier for the private bar to serve its clients well.

IV. INCLUSION OF FUTURE RETIREMENT BENEFITS IN PROPERTY SETTLEMENTS

A new state law adopted by the 1985 Indiana General Assembly⁴⁵ requires courts in divorce proceedings to include rights in and to certain pension and retirement benefits in property subject to division in a property settlement, even though such benefits are not presently payable,⁴⁶ and makes clear that the court may divide between the divorcing spouses the rights to collect payments from these plans as received.⁴⁷

Prior to the effective date of the 1985 act,⁴⁸ property to be divided between the parties to a divorce action⁴⁹ included "all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits."⁵⁰ Under this definition of "property," Indiana courts consistently have held that a court cannot award "an interest in a

³⁹*Id.*

⁴⁰*Id.* § 31-1-11.5-13(g).

⁴¹*Id.* § 31-1-11.5-13(h).

⁴²*Id.* § 12-1-6.1-15.3.

⁴³IND. CODE § 31-1-11.5-15 (1982).

⁴⁴*Id.* § 6-8.1-9.5-2.

⁴⁵Pub. L. No. 279-1985 (codified at IND. CODE §§ 31-1-11.5-2, -9 & -11 (Supp. 1985)).

⁴⁶IND. CODE § 31-1-11.5-2(d) (Supp. 1985).

⁴⁷*Id.* § 31-1-11.5-11(b).

⁴⁸The effective date is September 1, 1985.

⁴⁹Rules for disposition of property upon "final separation" are found at IND. CODE § 31-1-11.5-11 (Supp. 1985).

⁵⁰IND. CODE § 31-1-11.5-2(d) (1982).

spouse's *future* income, whether that income constitutes salary, pension, or retirement benefits."⁵¹ The 1985 act, however, changes this result in two ways. First, the definition of "property" is broadened to include, in addition to the limited rights to current pension or retirement benefits allowed prior to the 1985 enactment, "the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested, as that term is defined in Section 411 of the Internal Revenue Code, but that are payable after the dissolution of marriage; and . . . the right to receive disposable retired or retainer pay, as defined in 10 U.S.C. 1408(a), acquired during the marriage that is or may be payable after the dissolution of marriage."⁵² Secondly, the 1985 act expands the court's ability to divide the property of the parties to include ordering the distribution of the benefits added to the "property" definition when such benefits are payable after the dissolution of the marriage "by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt."⁵³

The 1985 act was made possible by two recently-enacted federal statutes: the Former Spouses' Protection Act⁵⁴ and the Retirement Equity Act.⁵⁵ The Former Spouses' Protection Act was enacted in 1982. This act provided for the first time that retired or retainer military pay could be assigned to former spouses of military personnel for property distributions made in accordance with a final decree of dissolution or legal separation, including property settlements incident to such decrees.⁵⁶

Of more general application is the Retirement Equity Act, enacted in 1984. The Employee Retirement Income Security Act (ERISA)⁵⁷ generally prohibits assignment or alienation of benefits under a pension, profit-sharing, or stock bonus plan.⁵⁸ Because these ERISA provisions supersede state law,⁵⁹ courts have held that ERISA's non-assignment (or "spendthrift") provisions preempt a state law (such as a community property law) which purports to give the non-employee spouse a right to receive qualified retirement or pension benefits following dissolution

⁵¹*Sadler v. Sadler*, 428 N.E.2d 1305, 1307 (Ind. Ct. App. 1981) (emphasis added); see also *In re Marriage of Delgado*, 429 N.E.2d 1125, 1127-28 (Ind. Ct. App. 1982).

⁵²IND. CODE § 31-1-11.5-2(d) (Supp. 1985).

⁵³IND. CODE § 31-1-11.5-11(b)(4) (Supp. 1985).

⁵⁴Pub. L. No. 97-252, 96 Stat. 730 (codified at 10 U.S.C. § 1408 (1982 & Supp. 1985)).

⁵⁵Pub. L. No. 98-397, 98 Stat. 1426 (codified at 29 U.S.C. §§ 1001 *et seq.* (1982 & Supp. 1985) & 26 U.S.C. §§ 401 *et seq.* (1982 & Supp. 1985)).

⁵⁶10 U.S.C. § 1408 (Supp. 1985).

⁵⁷29 U.S.C. § 1001 (1982).

⁵⁸29 U.S.C. § 1056(c) & (d) (1982).

⁵⁹29 U.S.C. § 1144 (1982).

of the marriage with the employee spouse.⁶⁰ Further, a retirement plan which does not include the "spendthrift" provisions does not qualify for the favorable federal income tax treatment given to qualified retirement plans.⁶¹ The Retirement Equity Act provides that an assignment of pension benefits in dissolution cases pursuant to a "qualified domestic relations order" ("QDRO")⁶² is an exception to the ERISA prohibition against assignment⁶³ and that such an assignment would not disqualify the plan under the Internal Revenue Code.⁶⁴

Indiana's 1985 Law, made possible by enactment of the Former Spouses' Protection Act and the Retirement Equity Act, is one with which domestic relations law practitioners must become familiar in order to access accurately the rights of spouses involved or about to become involved in divorce proceedings.

⁶⁰See, e.g., *McCarty v. McCarty*, 453 U.S. 208 (1981) in which the United States Supreme Court held that, despite the existence of California's community property law, a California court could not order an assignment of a portion of the husband's nonvested retirement benefits to the wife in a property settlement pursuant to a divorce decree. *Id.*

⁶¹26 U.S.C. § 411 (1982).

⁶²A QDRO must:

(1) Create or recognize the existence of an alternate payee's right to, or assign to an alternate payee, the right to receive all or a portion of the benefits payable to a participant (employee spouse) under a plan. An alternate payee may be a spouse, former spouse, child or dependent of the participant. Dependents of the alternate payor, if not also dependents of the participant, do not qualify as successor alternate payees.

(2) Contain the name and last known mailing address of the participant and the name and mailing address of each alternate payee covered by the order.

(3) Specify the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or, in the alternative, it may establish a procedure for determining an unknown percentage.

(4) Establish the number of payments or the period to which the order applies.

(5) List every plan to which the order applies.

(6) Be restricted to child support, alimony payments, or payments pursuant to property settlement rights.

(7) Be made pursuant to state domestic relation law.

26 U.S.C. § 1056(d)(3). A domestic relations order will not meet the requirements of ERISA if any of these requirements is not met nor if it exceeds the type or form of benefits, or any option, provided by the plan in question. It must not require the plan to provide increased benefits. It must not require benefits to be paid to a subsequent alternate payee which previously were ordered paid to a different alternate payee in a prior QDRO. *Id.*

⁶³29 U.S.C. § 1056(d)(3) (Supp. 1985).

⁶⁴26 U.S.C. § 401(a)(13)(B) (1982 & Supp. 1985); see generally S. Rep. No. 98-575, reprinted at U.S. CODE CONG. & AD. NEWS 2547, 2564-69.

V. TAX CONSEQUENCES OF PROPERTY SETTLEMENT TRANSFERS

Internal Revenue Code section 1041 states that no gain or loss will be recognized on a transfer of property to a spouse incident to a divorce.⁶⁵ It should be noted, however, that the transferee takes the basis of the transferor, and therefore, may recognize tax consequences on the sale or transfer of that property to a third party.⁶⁶ The 1984 amendments to the Code also exempted from taxation the transfer of Individual Retirement Accounts ("IRA's")⁶⁷ to a former spouse incident to a divorce.⁶⁸ The amendments additionally exempted certain qualified pension plans from taxation if rolled over to a qualifying IRA by the transferee within sixty days of distribution.⁶⁹

The Indiana General Assembly added a new section to the property disposition provisions of the Indiana Code⁷⁰ in an attempt to recognize these federal changes and clarify a potential conflict in caselaw concerning the recognition of tax consequences in the distribution of marital property.⁷¹ The new section states that "[t]he court, in determining what is just and reasonable in dividing property . . . shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party."⁷² Under prior caselaw, courts were split as to whether the trial court must consider the potential tax consequences in a property settlement.⁷³

In *Burkhart v. Burkhart*,⁷⁴ the husband contended that the trial court had abused its discretion in its award of the marital estate because it had not considered the capital gains tax which he would have incurred as a result of selling his stock in order to satisfy property settlement obligations to his wife. The First District Court of Appeals of Indiana rejected his contention, stating that where the settlement decree could be satisfied without a sale of the stock, it would be improper to consider

⁶⁵I.R.C. § 1041(a) (1985).

⁶⁶*Id.* § 1041(b).

⁶⁷*Id.* § 408(a).

⁶⁸*Id.* § 408(d)(6).

⁶⁹*Id.* § 408(d)(3).

⁷⁰Act of April 9, 1985, Pub. L. No. 280-1985, 1985 Ind. Acts 33 (codified in IND. CODE § 31-1-11.5-11.1 (Supp. 1985)).

⁷¹*See* *Wright v. Wright*, 471 N.E.2d 1240 (Ind. Ct. App. 1984) (court need not consider tax consequences in distribution of marital property); *Burkhart v. Burkhart*, 169 Ind. App. 588, 349 N.E.2d 707 (1976) (same). *Contra In Re Marriage of Mulvihill*, 471 N.E.2d 10 (Ind. Ct. App. 1984) (court did not abuse its discretion where it considered tax consequences in property disposition).

⁷²Act of April 9, 1985, Pub. L. No. 280-1985, 1985 Ind. Acts 33 (codified at IND. CODE § 31-1-11.5-11.1 (Supp. 1985)).

⁷³*See supra* note 71.

⁷⁴169 Ind. App. 588, 349 N.E.2d 707 (1976).

such a speculative obligation as the capital gains tax.⁷⁵ In reaching its conclusion the court did state "[t]his is not to say that the tax consequences are to be ignored" when considering a property settlement.⁷⁶

Burkhart can be contrasted with *In re Marriage of Mulvihill*⁷⁷ where the Third District Court of Appeals of Indiana determined that the trial court had not abused its discretion in deducting the husband's estimated tax liability on his pension plan when valuing the plan for property settlement purposes.⁷⁸ The court distinguished *Burkhart* because Mulvihill at some point in his life would have incurred tax liability for withdrawal of monies from his HR-10 plan, whereas Burkhardt's obligation to pay capital gains tax was merely speculative.⁷⁹

Less than thirty days after *Mulvihill* was decided, this issue was addressed again in a similar factual context by the First District Court of Appeals in *Wright v. Wright*.⁸⁰ The husband in *Wright* contended that it was error for the trial court in its disposition of property to distribute his pensions plan without considering the resulting tax consequences. The court reached a contrary conclusion from *Mulvihill* and held that the trial court did not abuse its discretion in failing to consider such "speculative" tax consequences.⁸¹ In reaching its conclusion, the court adopted the same reasoning of its prior opinion in *Burkhart* that where it was uncertain whether the husband would "cash in" his pension plan to satisfy the terms of the property settlement, the trial court was correct in not considering the tax consequences.⁸²

The current amendment to Indiana's dissolution of marriage statute appears to resolve this case conflict by mandating a consideration of the tax consequences of a property disposition. It must be noted, however, that the amendment would not necessarily result in an absolute reduction of marital assets when considering tax consequences because these consequences may be spread over a number of years, particularly where a spouse will receive deferred income.

⁷⁵*Id.* at 593, 349 N.E.2d at 711.

⁷⁶*Id.*

⁷⁷471 N.E.2d 10 (Ind. Ct. App. 1984).

⁷⁸*Id.* at 14.

⁷⁹*Id.*

⁸⁰471 N.E.2d 1240 (Ind. Ct. App. 1984).

⁸¹*Id.* at 1245.

⁸²*Id.*

Recovery of Punitive Damages Against Insurance Companies

STEPHEN E. ARTHUR*

During this survey period, the Indiana courts again reexamined the prerequisites for maintaining a claim for punitive damages against an insurance company in a first party action. Specifically, the courts refined the elements and evidentiary requirements enunciated by the Indiana Supreme Court in *Travelers Indemnity Company v. Armstrong*,¹ refinements which should have an impact not only upon an insured's burden of proof but also upon the trial court's instructions to the jury.

I. *Travelers Indemnity Company v. Armstrong* REVISITED

The general rule in Indiana is that punitive damages may not be recovered as an element of damages in breach of contract actions.² Exceptions exist when the breach is accompanied by an independent common law tort, or where elements of fraud, gross negligence, or oppression mingle with an insurance company's breach of contract.³ However, in *Travelers* the Indiana Supreme Court stated,

[Punitive] damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious

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¹442 N.E.2d 349 (Ind. 1982).

²See *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976), where the court stated:

The promisor's motive for breaching a contract is generally regarded as irrelevant, . . . because the promisee will be compensated for all damages proximately resulting from the promisor's breach Where the facts surrounding the promisor's breach indicate sub-standard business conduct, promisee may also enjoy a limited sense of requital in taking his business elsewhere in the future, but he is not entitled to mulct the promisor in punitive damages.

Id. at 607-08, 349 N.E.2d at 180; See also *D & T Sanitation, Inc. v. State Farm Mut. Auto. Ins. Co.*, 443 N.E.2d 1207 (Ind. Ct. App. 1983); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585 (Ind. Ct. App. 1982); *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981). See also APPLEMAN, *INSURANCE LAW AND PRACTICE* § 11256; Arthur, *Insurance*, 1984 *Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 265, 270-73 (1985).

³*Travelers Indemn. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976). See Arthur, *Insurance*, 1983 *Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 224-28 (1984).

conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.⁴

Moreover, the *Travelers* court changed the evidentiary standard for approving a punitive damage claim from a preponderance of the evidence to one requiring clear and convincing evidence.⁵ This clear and convincing evidence standard subsequently was codified by the Indiana General Assembly.⁶

II. *Town & Country Mutual Insurance Company v. Hunter*

The first case of this survey period which discussed punitive damages in first party actions was *Town & Country Mutual Insurance Company v. Hunter*.⁷ The facts in *Town & Country* revealed that a collision occurred between a motorcycle driven by the insureds (Hunters) and an automobile driven by an uninsured motorist. The Hunters maintained two policies of insurance which included uninsured motorist coverage. As a result of the accident, Mr. Hunter suffered injuries and his wife, a passenger on the motorcycle at the time of the accident, died. Mr. Hunter testified that the uninsured motorist had been driving negligently and that this negligence had caused the accident.

Town & Country discovered, upon investigation, that Mr. Hunter had been drinking prior to the accident, and the insurer made a determination that the uninsured motorist was not liable for the collision. As a result, Town & Country paid medical payment claims and death benefits under the insurance policies but denied Hunter's uninsured motorist claim, even though Town & Country had established reserves to cover these claims.

Subsequently, the uninsured motorist made an inconsistent statement to Hunter's attorney indicating that the uninsured motorist in fact had been negligent. After reading this statement, Town & Country stated a desire to reach a settlement agreement with Hunter; however, the uninsured motorist later retracted her statement reverting to the original version of the incident wherein she omitted no fault. Town & Country then again denied Hunter's claim under the uninsured motorist provision, and Hunter instituted an action against Town & Country for breach of the insurance contract. The jury awarded Hunter compensatory and punitive damages for Town & Country's failure to settle the uninsured motorist claims.

⁴*Travelers Indemn. Co. v. Armstrong*, 442 N.E.2d at 362.

⁵*Id.* at 358-63.

⁶IND. CODE §§ 34-4-34-1 to -2 (Supp. 1985).

⁷472 N.E.2d 1265 (Ind. Ct. App. 1984).

On appeal, the Indiana Court of Appeals reversed the punitive damage award. The court stated that punitive damages may be awarded only when an insurance company's conduct reflects malice, fraud, gross neglect, oppression, or bad faith by clear and convincing evidence.⁸ A good faith dispute over the amount of damages will not supply the grounds for punitive damages, nor will an incorrect evaluation of an insured's claim.⁹ The court stated that an insured may prevail on a request for punitive damages only by proving that the insurer acted with knowledge that it had no legitimate basis for denying coverage.¹⁰ From such actions, a jury may infer malice or oppressive conduct on the part of the insurer.¹¹

The court then concluded that evidence existed which supported a hypothesis that the insurer had acted in good faith when denying coverage because of the evidence that Mr. Hunter was contributorily negligent.¹² The court further stated that evidence of inadequate or negligent investigation by the insurance company cannot support a punitive damage claim by clear and convincing evidence when the negligence or insufficiency in the investigation can be attributed to human error.¹³ Finally, the court stated that Town & Country's action to establish reserve accounts on the uninsured motorist claims was evidence of good faith, not bad faith as was claimed by the insured.¹⁴

III. *Mutual Hospital Insurance Inc. v. Hagner*

In *Mutual Hospital Insurance, Inc. v. Hagner*,¹⁵ an insured brought an action against Mutual Hospital Insurance, Inc. (Blue Cross) for its failure to pay for medical treatments rendered to the insured's son under a medical insurance program provided by General Motors. The evidence revealed that the child had fallen and broken several front teeth, which

⁸*Id.* at 1268.

⁹*Id.* The Court of Appeals in *Town & Country* stated, "Courts must take care not to discourage honest litigation by allowing punitive damages against a party which is exercising its right to adjudicate a real dispute, even if that party is found to be in error and the litigation injures the other party." *Id.* (citing *First Federal Savings and Loan Ass'n of Indianapolis v. Mudgett*, 397 N.E.2d 1002 (Ind. Ct. App. 1982)).

¹⁰*Id.* at 1269. See also *State Farm Mut. Auto. Ins. Co. v. Shuman*, 175 Ind. App. 186, 370 N.E.2d 941 (1977); *Sexton v. Meridian Mut. Ins. Co.*, 166 Ind. App. 529, 337 N.E.2d 527 (1975); *Rex Ins. Co. v. Baldwin*, 163 Ind. App. 308, 323 N.E.2d 270 (1975); *Physicians Mut. Ins. Co. v. Savage*, 156 Ind. App. 283, 296 N.E.2d 165 (1973).

¹¹*Town & Country*, 472 N.E.2d at 1269 (citing *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981)). See also *Miller Pipeline Corp. v. Broeker*, 460 N.E.2d 177 (Ind. Ct. App. 1984).

¹²*Town & Country*, 472 N.E.2d at 1269.

¹³*Id.*

¹⁴*Id.*

¹⁵475 N.E.2d 32 (Ind. Ct. App. 1984).

resulted in subsequent medical complications. As a result of the complications, a dentist was required to place the child under general anesthesia, to remove dead pulp from each broken tooth, to fill the open wounds, and to cover the broken teeth with steel crowns. Following this treatment, the insured filed a claim with Blue Cross for the hospital and medical expenses. The initial claim for hospital expenses was paid; however, when the insured submitted a claim for the remaining medical expenses, the claim was denied, and Blue Cross demanded a refund for the initial payments made to the insured based on an opinion that "no concurrent medical hazard" existed, which was an exception under the policy. Subsequently, the insured requested a review of the claim and submitted to Blue Cross a physician's letter verifying the health-related problems suffered by the child as a result of his injuries. In response to this letter, Blue Cross withdrew its refund request, stating that the claim was payable because it was accident-related. The insured resubmitted the claim for the doctor's services, but the claim was again denied, and Blue Cross made another refund demand. Further correspondence failed to resolve the conflict, and the insured wrote to the president of Blue Cross requesting assistance. Blue Cross again reviewed the claim, determined that the claim should be denied, and outlined the basis of its denial in a detailed letter mailed to the insured. Additionally, Blue Cross dropped its request for a refund of the payment for hospital services.

Unsatisfied, the insured instituted an action against Blue Cross. The trial court awarded compensatory and punitive damages, basing its punitive damage award on a finding that Blue Cross had avoided payment of a claim deliberately and in bad faith.

The Indiana Court of Appeals reversed the punitive damage award, determining that the record disclosed no more than a good faith dispute between the parties.¹⁶ The court stated that punitive damages may not be awarded when a dispute arises in good faith because of the "prohibitive social cost" of making such claims indisputable.¹⁷ Additionally, the court restated the language of *Travelers* that clear and convincing evidence to support an award of punitive damages requires some evidence which is inconsistent with a hypothesis that the tortious conduct was the result of an honest mistake, error, over-zealousness, or negligence.¹⁸ The court stated that the insurer's vacillation on the question of the refund, while perhaps supportive of a finding of malice, was not inconsistent with a hypothesis of honest error or over-zealousness.¹⁹ Because the insured

¹⁶*Id.* at 36.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

failed to disprove affirmatively the good faith hypothesis, the court concluded that the evidence failed to satisfy the *Travelers* clear and convincing evidence standard.²⁰

IV. *Bymaster v. Bankers National Life Insurance*

Finally, in *Bymaster v. Bankers National Life Insurance Company*,²¹ applicants for life insurance brought an action against the insurance company (Bankers), its agent at the time of solicitation (CNC), and that agent's agent, for compensatory and punitive damages arising from the defendants' failure to refund an advanced premium following Bankers' denial of the applications for life insurance. The trial court entered judgment against the plaintiff as to punitive damages, and that judgment was affirmed by the Indiana Court of Appeals.

The facts presented in the plaintiffs' case revealed that Bankers had entered into a General Agent's Agreement with CNC to sell Bankers' life insurance policies. In turn, CNC appointed an officer of CNC as its agent. The general agency agreement provided that all moneys received by CNC for premiums would be held in a premium trust account and that ten percent of the premiums would be due and payable immediately to Bankers. Bankers also had a right to audit the account. CNC was entitled to retain the balance of ninety percent once the policy was delivered to the insured.

CNC's agent wrote an insurance application for the insureds (Bymasters). The application reflected that Mrs. Bymaster had a history of cancer and that Mr. Bymaster had a history of heart trouble. The insurance policies were heavily conditioned, including a requirement that the Bymasters pass medical examinations. The Bymasters wrote a check to CNC for the first year premiums, and CNC issued a written guarantee to the Bymasters for the return of the premiums if the policies were not issued. Pursuant to the agency agreement, ninety percent of the premiums was retained by CNC and ten percent was remitted to Bankers.

The Bymasters submitted to medical examinations, but Bankers requested additional information concerning the Bymasters health histories. When such information was not forthcoming, Bankers notified the Bymasters that their applications had been denied. When the Bymasters had not received a return of their premiums after approximately one month, they began telephoning and writing Bankers to demand the return of their premiums. Bankers remitted a check to the Bymasters for ten percent of the premiums paid and instructed the Bymasters that all

²⁰*Id.* See also *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986) (clear and convincing evidence standard also applicable to imposition of punitive damages for pure tort cases under the good faith hypothesis).

²¹480 N.E.2d 273 (Ind. Ct. App. 1985).

additional moneys should be paid by CNC. Until that time, the Bymasters had not been aware of the ninety percent/ten percent agreement between Bankers and CNC.

During this period, Bankers commenced an audit of the premium trust account and terminated the agency agreement with CNC. Thereafter, Bankers filed a formal complaint against CNC with the Illinois Department of Insurance alleging that CNC repeatedly had misrepresented the terms of certain policies and had violated regulations concerning the return of moneys held in the premium trust accounts. During this same period, Bankers was unaware that CNC had not remitted the ninety percent premiums to the Bymasters.

The court noted that the acts of an agent can be charged to a principal insurance company and that an insurer's recklessness in employing or retaining an agent may make the insurer liable for punitive damages.²² The court also noted, however, that no fiduciary relationship arises between an insurer and an insured which entitles the insured, after a dispute has arisen, to rely upon the insurer's interpretation of an insurance contract.²³ Moreover, while an insurer has a duty not to make fraudulent representations to its insured, it is not required to be correct in its interpretation of the policy.²⁴ Because the Bymasters had failed to establish that Bankers, CNC, or its agent had misrepresented the policies or any terms thereunder, and the controversy centered only on the return of premiums after the Bymasters' application for life insurance had been denied, there was no fiduciary duty upon which a claim for punitive damages could be based.²⁵

With respect to the failure to return the premiums to the Bymasters, the court stated that Bankers could not be charged with CNC's failure to return the ninety percent premium.²⁶ The court stated that an agent who commits an independent fraud for his own benefit ceases to act as an agent for his principal and that punitive damages cannot be maintained against the insurer principal who is innocent of any wrongdoing.²⁷ Noting that CNC's acts of conversion had advanced no interest of Bankers and that Bankers had never condoned CNC's conduct, the court concluded that the Bymasters were not entitled to an award of punitive damages against Bankers.²⁸

²²*Id.* at 276.

²³*Bymaster*, 480 N.E.2d at 277 (citing *Travelers Indemn. Co. v. Armstrong*, 442 N.E.2d 349, 364 (Ind. 1982)).

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 278.

²⁷*Id.* at 279.

²⁸*Id.*

V. SOLIDIFICATION OF METHODOLOGY FOR ESTABLISHING PUNITIVE DAMAGES CLAIM

As such, these three cases have reaffirmed *Travelers* and have solidified the methodology which should be used to establish a punitive damage claim in first party insurance contract actions. This methodology entails that (1) the insured must present clear and convincing evidence that the breach of insurance contract is accompanied by an independent common law tort such as fraud or misrepresentation, or establish by clear and convincing evidence that elements of fraud, gross negligence, or oppression have mingled with the insurance company's breach of contract; (2) present evidence that is inconsistent with a hypothesis that the improper conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, negligence, or other noniniquitous human failing; and (3) establish that punitive damages will further a social end of punishing the wrongdoer and that their imposition will deter future misconduct by the insurer or the insurance industry.²⁹

Conduct which will not be held to constitute bad faith sufficient to support an award of punitive damages includes an insurer's denial of a claim based on the insurer's good faith belief that no coverage is owed to the insured,³⁰ incompetence or negligence by an insurer's employees or agents in processing and evaluating an insured's claim,³¹ negligent investigation of an insured's claims,³² or settlement practices which fall below insurance industry standards.³³

²⁹An insured has no right to punitive damages. These damages are considered a windfall to the insured and are not compensatory in nature, but are awarded only to punish the wrongdoer or to deter similar misconduct by others. *Travelers Indemn. Co. v. Armstrong*, 442 N.E.2d 349, 358-63 (Ind. 1982); *see also* *Bymaster v. Bankers Nat. Life Ins. Co.*, 480 N.E.2d 273, 278 (Ind. Ct. App. 1985); *Farm Bureau Mut. Ins. Co. v. Dercach*, 450 N.E.2d 537, 541 (Ind. Ct. App. 1983).

³⁰*See, e.g.*, *Travelers Indemn. Co. v. Armstrong*, 442 N.E.2d 349, 364 (Ind. 1982); *Town & Country Mut. Ins. Co. v. Hunter*, 472 N.E.2d 1265, 1269 (Ind. Ct. App. 1984); *American Family Ins. Group v. Blake*, 439 N.E.2d 1170, 1175 (Ind. Ct. App. 1982); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 595 (Ind. Ct. App. 1982); *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978, 987-88 (Ind. Ct. App. 1981).

³¹*See, e.g.*, *Town & Country Mut. Ins. Co. v. Hunter*, 472 N.E.2d 1265 (Ind. Ct. App. 1984); *D & T Sanitation, Inc. v. State Farm Mut. Auto. Ins. Co.*, 443 N.E.2d 1207, 1209 (Ind. Ct. App. 1983).

³²*See, e.g.*, *Town & Country Mut. Ins. Co. v. Hunter*, 472 N.E.2d 1265, 1269 (Ind. Ct. App. 1984); *Continental Casualty Corp. v. Novy*, 437 N.E.2d 1338, 1356 (Ind. Ct. App. 1982); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 596 (Ind. Ct. App. 1982).

³³*See, e.g.*, *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 596 (Ind. Ct. App. 1982). *But see* *Indiana Unfair Claims Settlement Practices Act*, IND. CODE § 27-4-1-4.5 (Supp. 1985). The effect of this Act upon the substantive and evidentiary requirements of *Travelers* has yet to be addressed by the Indiana courts. The Act enumerates numerous unauthorized practices and empowers the Insurance Commissioner to impose cease and

As a matter of trial strategy, the insurance company should tender an instruction which requires the jury to find clear and convincing evidence of tortious conduct and evidence which is inconsistent with the hypothesis of a good faith mistake or negligence. The tendered instruction also should identify exceptions to bad faith claims, *e.g.*, negligent investigation or incompetence, to the extent that such exceptions are supported by the evidence, and instruct the jury that punitive damages cannot be awarded if the evidence supports these exceptions. Finally, the instruction should require the jury to determine that punitive damages will punish the insurer or deter future misconduct by that insurer or the insurance industry, and that imposition of punitive damages for this reason will result in a non-prohibitive social cost to the insurance premium paying public.

VI. CONCLUSION

Indiana courts have demonstrated a clear preference for disallowing punitive damages except in the most egregious instances of misconduct by the insurer. However, there are numerous unsettled questions which will necessarily be addressed as the plaintiff's bar and the insurance industry square off in a continued effort to establish the limits and requirements for maintaining a civil action for punitive damages for an insurer's breach of insurance contract.

desist orders and monetary penalties against an insurance company for violating the Act. Unsettled is the question of whether an adverse or unfavorable determination by the Insurance Commissioner after an administrative hearing against an insurer will be admissible in a first party action where punitive damages are sought. Also unsettled is the question of whether a violation under the Act is relevant and admissible to prove an insurer's bad faith conduct. See Arthur, *Insurance, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 241-42 (1984).

It Was No Accident That . . .

JOSEPH M. FORTE*

I. INTRODUCTION

The most significant development in workmen's compensation law during the survey period was the definitive re-entrenchment of a conservative definition of "compensable accident."¹ In *Houchins v. J. Pierponts*,² the Indiana Court of Appeals, while having a plethora of cases from which to cite for the definition of "accident," chose one of the earliest cases defining accident as "any unlooked for mishap or untoward event not expected or designed."³ This was the signal that the court, after experiencing much difficulty in defining the term "accident,"⁴ had returned to the simple definition contained in the historical underpinnings of this term of art.

This Article will discuss the various cases that have developed the distinct definitions of "accident," and suggest that the conservative approach adopted by the *Houchins* court is the best resolution of the problem.

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¹IND. CODE § 22-3-2-2 (1982) provides that the Workmen's Compensation Act applies to "personal injury or death by accident arising out of and in the course of the employment."

²*Houchins v. J. Pierponts*, 469 N.E.2d 786 (Ind. Ct. App. 1984).

³*Haskell and Barker Car Co. v. Brown*, 67 Ind. App. 178, 187, 112 N.E. 555, 557 (1917). This is the first reported case since the initial adoption of the Act two years earlier to define the term "accident." Cases adhering to this definition of accident are numerous. See, e.g., *Estey Piano Corp. v. Steffen*, 164 Ind. App. 239, 328 N.E.2d 240 (1975); *Pearson v. Rogers Galvanizing Co.*, 115 Ind. App. 426, 59 N.E.2d 364 (1945); *American Maize Products Co. v. Nichiporchick*, 108 Ind. App. 502, 29 N.E.2d 801 (1940); *Indian Creek Coal and Mining Co., v. Calvert*, 68 Ind. App. 474, 119 N.E. 519 (1918).

⁴Upon reviewing the decisions of the supreme court and the court of appeals concerning the definition of the word "accident" as used in workmen's compensation law, one finds that nearly all decisions rendered were not unanimous, and most contain dissenting or concurring opinions. This has made it difficult to reconcile the case law. Judge Buchanan summarized this state of confusion in his concurring opinion in *Estey Piano Corp. v. Steffen*, 164 Ind. App. 239, 250, 328 N.E.2d 240, 247 (1975), stating:

My analysis of the cases interpreting an "accident arising out of and in the course of employment" leads me to the conclusion that the word "accident" . . . has been elasticized to the breaking point. In the search for extension of employer's liability for accident connected injuries, the law on this subject has become hopelessly conflicting and confused . . . and would appear to have gone far beyond the original intent of the framers of the Workmen's Compensation Act.

II. UNEXPECTED CAUSE V. UNEXPECTED RESULT

Early in the courts' interpretation of the Workmen's Compensation Act,⁵ it was determined that an "accident" within the meaning of the Act required some kind of "unexpected event."⁶ Differing views, however, were developed regarding whether the event required was an unexpected *cause* or an unexpected *result*.

Most decisions followed the unexpected cause theory. The unexpected cause theory requires some type of increased risk such as a fall, slip, trip, unusual exertion, malfunction of machine, automobile accident, or similar unique situation presenting a risk to the worker over and above the risks of daily life.⁷ The unexpected cause theory is illustrated in *City of Anderson v. Borton*.⁸ In *Borton*, the claimant was bending over to lift a trap door to read a utility meter when he experienced back pain.⁹ The claimant did not suffer any unusual strain, exertion, untoward or unusual event of any kind that may have precipitated these pains.¹⁰ To the contrary, the evidence showed that the plaintiff had a constant traumatic condition and that any trivial act, such as walking, might have caused a protrusion of the claimant's degenerated disc to press upon a nerve root. Accordingly, the court reversed the Industrial Board's award in favor of the claimant.¹¹

The second theory of accident, the unexpected result definition, is illustrated by *Ellis v. Hubbell Metals, Inc.*¹² In *Ellis*, the claimant suffered a back injury while performing his normal work duties.¹³ There was evidently no unusual exertion of any kind, nor any mishap precipitating the injury.¹⁴ The court in *Ellis*, however, finding that the unexpected result theory better comported with the humanitarian purposes of the Act, held that because the resultant injury was "neither foreseen nor expected . . . Ellis suffered an 'accident' in the course of his employment."¹⁵

Resolution of these opposing theories came in the court of appeals decision in *Young v. Smalley's Chicken Villa*.¹⁶ In *Young*, the court of appeals interpreted the decision of the Indiana Supreme Court in *Calhoun*

⁵IND. CODE § 22-3 (1982).

⁶See *supra* note 2.

⁷See, e.g., *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 366 N.E.2d 207 (1977).

⁸132 Ind. App. 684, 178 N.E.2d 904 (1961).

⁹*Id.* at 686, 178 N.E.2d at 904.

¹⁰*Id.* at 691, 178 N.E.2d at 908.

¹¹*Id.* at 694, 178 N.E.2d at 909.

¹²174 Ind. App. 86, 366 N.E.2d 207.

¹³*Id.* at 87, 366 N.E.2d at 208.

¹⁴*Id.* at 93, 366 N.E.2d at 212.

¹⁵*Id.*

¹⁶458 N.E.2d 686 (Ind. Ct. App. 1984).

*v. Hillenbrand Industries*¹⁷ as a declaration that the unexpected event requirement was synonymous with the unexpected cause theory, and not the more liberal unexpected result theory.¹⁸ Thus, the court affirmed the denial of compensation to a claimant who suffered his back injury while bending over to retrieve a piece of chicken from a deep fat fryer.

III. *Houchins* — THE BEST SOLUTION

A. *Houchins*

In *Houchins v. J. Pierponts*,¹⁹ decided during the survey period, the court of appeals firmly entrenched the “cause” interpretation of “accident” adopted in *Young*.²⁰ In *Houchins*, the claimant had finished wiping out the bottom of a refrigerator and attempted to stand from a squatting position when her knee locked.²¹ She was eventually hospitalized and underwent surgery for the locked knee.²² Although the event occurred without any slipping, falling, or twisting of her foot,²³ and the claimant had not felt anything unusual in her knee prior to attempting to stand from the squatting position,²⁴ the single hearing member found the case to be compensable.²⁵ On appeal to the full Industrial Board, the award was reversed with a finding of “no accident.”²⁶ The court of appeals affirmed the Industrial Board’s denial.

With *Young* serving as a foundation, the import of *Houchins* is magnified tremendously. Without the *Young* decision, *Houchins* may easily have been fit into the unexpected result theory of *Ellis*. The claimant’s medical history revealed that she had a long history of her knee locking once or twice per year since she had undergone surgery as a child.²⁷ *Houchins* testified that when she squatted down, or would practice gymnastics, she could expect her knee to lock up, although she was able to manipulate it manually to the point of release prior to the industrial incident.²⁸ Therefore, her application to the Industrial Board could have been rejected because the result could not have been considered unexpected and within the guidelines of *Ellis*.²⁹

¹⁷269 Ind. 507, 381 N.E.2d 1242 (1978).

¹⁸458 N.E.2d at 688.

¹⁹469 N.E.2d 785 (Ind. Ct. App. 1984).

²⁰See *supra* text accompanying notes 16-18.

²¹469 N.E.2d at 787.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹See *supra* notes 14-15 and accompanying text.

With the *Young* decision, however, it is clear that consideration of the degree to which the result can be expected is not a relevant factor. The more conservative view, requiring a sudden and untoward event or unusual happening to precipitate the injury, is the essence of a compensable accident under the workmen's compensation law. Accordingly, *Houchins* clearly requires an accident in the classical or common sense of the word; one cannot recover for injuries without an event which provided an increased risk springing out of the work environment.

The magnitude of the *Houchins* decision becomes apparent upon the realization that many injuries may occur as easily when rising from bed in the morning or bending to tie a shoelace as when lifting a heavy object at work. The burden of proving an accident has once again been placed upon the claimant. No longer will mere location of the claimant at his place of employment be sufficient to make the injury compensable when an ordinary act such as bending over is involved.

B. The Criticism

There is, nevertheless, an undercurrent of criticism of the unexpected cause theory calling for an adoption of the unexpected result theory articulated in *Ellis v. Hubbell Metals*.³⁰ In *Kerchner v. Kingsley Furniture Co.*,³¹ decided in early 1985, Judge Ratliff openly expressed his displeasure with the unexpected cause theory. Judge Ratliff, viewing the unexpected cause requirement as a departure from the underlying humanitarian purposes of the Workmen's Compensation Act, stated, "The proper focus in determining eligibility for workmen's compensation benefits should be upon an unexpected or untoward result arising out of and in the course of the employment. . . ."³²

Judge Ratliff's criticisms are not new. In *Calhoun v. Hillenbrand Industries*,³³ the case credited with having firmly established the unexpected cause rule, Justice DeBruler, in dissent, expressed his view that the unexpected cause theory was contrary to law.³⁴ Additionally, in *Young v. Smalley's Chicken Villa*,³⁵ Judge Neal characterized the unexpected cause theory as a resurrection of tort theories intended to be laid to rest by the Workmen's Compensation Act.³⁶

³⁰174 Ind. App. 86, 366 N.E.2d 207. See also *supra* text accompanying notes 12-15.

³¹478 N.E.2d 74 (Ind. Ct. App. 1985).

³²*Id.* at 78 (Ratliff, J., concurring).

³³269 Ind. 507, 381 N.E.2d 1242 (1978).

³⁴*Id.* at 511-12, 381 N.E.2d at 1244-45 (DeBruler, J., dissenting).

³⁵458 N.E.2d 686.

³⁶*Id.* at 688 (Neal, J., concurring).

C. Unexpected Cause — The Best Solution

While those who dissent from the classical definition of "accident" may be correct in their claims that certain tort issues and analyses have been reinjected into the Workmen's Compensation Act, and that on occasion this may be viewed as frustrating the humane purposes of the Act, practical experience would suggest restraint in departing from the principles established in the *Calhoun* decision. All too often, an unjust result would occur if the defendant were required to make his case merely by arguing that the accident did not arise out of and in the course of the employment.

While there may be a significant overlap between the areas of "accident" and "arising out of and in the course of employment" from a legal standpoint,³⁷ the medical component of workmen's compensation law pertinent to the definition of accident should not be ignored. Practitioners in the area know well that the typical ruptured disc injury could

³⁷It should be noted that this overlap, or unfortunate blurring, between the areas of "accident" and "arising out of and in the course of employment" is graphically illustrated in the recent court of appeals decision in *Evans v. Yankeetown Dock Corp.*, 481 N.E.2d 121 (Ind. Ct. App. 1985) (decided after the present survey period). In *Evans*, a case dealing with the definition of "personal injury or death by accident" under IND. CODE § 22-3-2-6 (Supp. 1985), the pre-emption provision of the Workmen's Compensation Act, the court rejected the unexpected cause theory announced in *Calhoun* and *Houchins*, and essentially adopted the unexpected result theory of *Ellis*. *Evans*, 481 N.E.2d at 129. The *Evans* court, however, then proceeded to analyze the requirement that the "accident" "arise out of and in the course of employment." *Id.* Using the same heart attack example used by this author, see *infra* text accompanying notes 38-42, the court concluded that changing the definition of "accident" and focusing on "arising out of and in the course of employment" "does not change the law as it has been applied." *Evans*, 481 N.E.2d at 121.

One must, however, notice the bootstrap effort to build a foundation from which to change the definition of "accident" in the compensation section of the Act, IND. CODE § 22-3-2-2 (Supp. 1985), by changing the definition of "accident" in the pre-emption section of the Act, IND. CODE § 22-3-2-6 (Supp. 1985). The court embarks on a jurisdictional quest and becomes sidetracked with issues of compensability so as to posit that injury with no discernible causation is covered. *Evans*, 481 N.E.2d at 128. Such a position destroys the causation requirements of the Act and flies in the face of the supreme court's holding in *Calhoun*. Most importantly, the court in *Evans* begs the question with its assumption that personal injury by accident is the equivalent of accidental injury, thereby eliminating the proximate cause requirement originally written into the Act by the legislature.

It should also be noted that the *Evans* court reviews what it considers to be the current state of confusion resulting from an attempt to determine whether the event used to define "accident" is an unexpected injury (result) or unexpected source (cause). Notably absent from the court's analysis was any acknowledgement of the resolution of this supposedly confusing issue by the *Young* and *Houchins* decisions. Such an unprecedented assumption that personal injury by accident is the same as accidental injury, so as to eliminate the proximate cause requirement, constitutes a truly unfortunate muddying of the waters finally made clear, if only for a time, by the decisions in *Young* and *Houchins*.

have occurred when the claimant arose from bed in the morning, bent over to tie his shoe, or stooped to pick up a dropped pencil. Medically and legally it would seem unfounded to bring such occurrences within the ambit of workmen's compensation when the only tie to the Act is that the occurrence took place while the individual was performing services on behalf of his employer. Such an approach would remove from legal analysis medicine's contribution of determining the mechanism of injury. The unexpected result approach would "water down" or eliminate the causal connection which assures fairness to the employer by not requiring the employer to be responsible for random conditions and occurrences of life which are unrelated to any risk or hazard of the work environment. Sufficient latitude exists to maintain peaceful coexistence between the humanitarian purpose and spirit of the Workmen's Compensation Act and the classical definition of "accident"; and the Industrial Board and the courts have maintained such a balance in various difficult areas.

Heart attack cases provide an excellent example of the ability of the courts and the Industrial Board to make workable the classic definition of accident. In *United States Steel Corporation v. Dykes*,³⁸ the court formulated an unusual exertion test to define accident in heart failure cases. In *Dykes*, the decedent's heart was gradually losing its functional ability.³⁹ There was no evidence of increase in the workload or any extra exertion on the day of the heart attack.⁴⁰ An autopsy showed the heart to have failed because of unoxygenated blood resulting from long-standing coronary disease.⁴¹ Based on those facts, Judge Bobbitt wrote:

Under the evidence in this case, decedent's fatal heart attack might have happened while he was working, driving his car, sitting or even sleeping. It happened while he was working at his usual occupation; and in such event it could be said that his heart failed because it could not handle the load then demanded of it. In our opinion it was not the intention of the Legislature that such happenings be considered a "death by accident arising out of and in the course of employment"

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The mere showing that he was performing his usual routine everyday task when he suffered a heart attack does not establish a right to workmen's compensation⁴²

³⁸238 Ind. 599, 154 N.E.2d 111 (1958).

³⁹*Id.* at 608, 154 N.E.2d at 116.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 611-13, 154 N.E.2d at 118-19 (citation omitted).

In *Harris v. Rainsoft of Allen County, Inc.*,⁴³ however, a heart attack was found to be compensable. In *Harris*, the President of Rainsoft witnessed a fire within the same building that housed his corporation.⁴⁴ Late one evening, he was awakened by a telephone call reporting that his business premises were on fire.⁴⁵ The victim went to the premises and observed the fire which had encompassed his business.⁴⁶ Moments after arrival, he became pale and fell to the ground. He was then taken to the hospital and died that night.⁴⁷ Medical testimony indicated that the decedent had a history of heart disease, suffering his first heart attack in December of 1975.⁴⁸ He also suffered from arteriosclerosis, or hardening of the arteries, which was an ongoing disease process.⁴⁹

Medical testimony in *Harris* showed that emotional stress can be a factor in precipitating certain abnormalities of heart disease and that the stress surrounding the fire could have been a factor in precipitating the attack.⁵⁰ Thus, the court of appeals held in the claimant's favor, finding as a matter of law that it was not merely a physical stimulus which could, as in the case of extra exertion or trauma, cause a compensable heart attack; psychological, mental, or emotional stimuli were held to satisfy the requirement of an event or happening beyond mere employment as required by the *Dykes* case.

The approach taken in the *Rainsoft* case demonstrates that the classical definition is workable and can live harmoniously with the humanitarian purpose of the Workmen's Compensation Act. Moreover, the employer is protected from becoming a "super insurance policy" through workmen's compensation for those problems which are a part of everyday life.

IV. CONCLUSION

Given the adaptability which allows both the protection of the employer as well as humanitarian concern for the employee, the unexpected cause theory, while not the most liberal approach, is the most equitable. Thus, it was no accident that the court in *Houchins* applied the classical definition of accident. The definition firmly entrenched by *Houchins* is historically sound and workable even in problematic areas

⁴³416 N.E.2d 1320 (Ind. Ct. App. 1981).

⁴⁴*Id.* at 1321.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.* at 1322.

involving close questions of medical and legal causation. In finally laying to rest the competing theory of accident espoused in the *Ellis* case, much confusion in the law of workmen's compensation has been eliminated.

Developments in Employment Discrimination Law

LYNN BRUNDAGE JONGLEUX*

This Article will survey significant developments in employment discrimination law, with the main focus on decisions arising under Title VII¹ and the Age Discrimination in Employment Act ("ADEA").² Both the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit rendered several noteworthy employment discrimination decisions within the Survey period.

I. SUPREME COURT SURVEY

A. *The ADEA and Bona Fide Occupational Qualification*

The United States Supreme Court decided on the same day in June, 1985, two age discrimination cases involving mandatory retirement ages. The ADEA prohibits discrimination on the basis of age against employees who are at least forty years of age but less than seventy years of age, except where age is shown to be "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the operation of the particular business."³ In both cases, the defendants asserted BFOQ defenses.

In *Johnson v. Mayor and City Council of Baltimore*,⁴ six Baltimore firefighters brought an ADEA action in the Maryland District Court challenging city code provisions mandating retirement age lower than seventy. The district court rejected Baltimore's contention that the lower age was a BFOQ, ruling that the city had not met its burden of showing the existence of a BFOQ.⁵

The United States Court of Appeals for the Fourth Circuit reversed,⁶ however, determining that because a *federal* civil service statute requires federal firefighters to retire at age fifty-five, the same age is a BFOQ for state and local firefighters as a matter of law. The Fourth Circuit relied on language in *EEOC v. Wyoming*⁷ in which the Supreme Court

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¹42 U.S.C. §§ 2000e-2000e-17 (1982).

²29 U.S.C. §§ 621-634 (1982).

³*Id.* § 623(f)(1).

⁴105 S. Ct. 2717 (1985).

⁵*Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. 1287 (D. Md. 1981).

⁶*Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209 (1984).

⁷460 U.S. 226 (1983).

observed that the ADEA tests a state's discretion to impose a mandatory retirement age "against a reasonable federal standard."⁸ The court of appeals went on to conclude that this federal civil service statute was the "reasonable federal standard" by which to test the asserted BFOQ because Congress has selected fifty-five as the retirement age for most federal firefighters.⁹

A unanimous Supreme Court reversed the Fourth Circuit,¹⁰ explaining that the appeals court had misinterpreted the language from *EEOC v. Wyoming*. That language, the Court maintained, does not mean that what is permissible under the ADEA can be determined simply by reference to a federal statute establishing a retirement age for a class of federal employees.¹¹ The "reasonable federal standard" referred to in the *Wyoming* case is the "standard supplied by ADEA itself—that is, whether the age limit is a BFOQ."¹² The federal rule applicable by its terms only to federal employees does not necessarily authorize a state or local government to adopt the same rule and have it held to be a BFOQ *as a matter of law*.¹³

The Court found it improper to conclude that Congress intended the federal provision to be dispositive in other realms because it may have imposed the age limit for other (non-BFOQ) reasons.¹⁴ The Court did go on to say, however, that the particular evidence Congress had considered and the conclusion it reached might be *admissible* in making the BFOQ determination as it related to city employees.¹⁵

In the second age discrimination case, *Western Air Lines, Inc. v. Criswell*,¹⁶ the defendant airline challenged the BFOQ instructions given to a jury that rendered a verdict for the plaintiffs.¹⁷ The action had been brought by two pilots denied reassignment as flight engineers upon reaching age sixty and a flight engineer forced to retire at sixty pursuant to Western's mandatory retirement policy for flight engineers.¹⁸

At trial, Western defended its policy by arguing that age sixty is a BFOQ for flight engineers.¹⁹ The district court's instructions to the jury

⁸*Id.* at 240.

⁹731 F.2d at 213.

¹⁰105 S. Ct. at 2721.

¹¹*Id.* at 2722.

¹²*Id.*

¹³*Id.*

¹⁴*Id.* at 2723-26.

¹⁵*Id.* at 2726-27.

¹⁶105 S. Ct. 2743 (1985).

¹⁷*Western Air Lines, Inc. v. Criswell*, 514 F. Supp. 384 (C.D. Cal. 1981).

¹⁸105 S. Ct. at 2747. The Federal Aviation Administration has established by regulation a mandatory retirement age of sixty for pilots and copilots, but sets no mandatory retirement age for flight engineers. 14 C.F.R. § 121.383(c) (1985); 49 Fed. Reg. 14,695 (1984).

¹⁹*Id.* (citing 514 F. Supp. 384).

followed the analysis elucidated by the United States Court of Appeals for the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*²⁰ In *Tamiami*, the Fifth Circuit maintained that the BFOQ inquiry, where public safety is a factor, is accomplished by asking, first, if the employer's restrictive job qualifications are "reasonably necessary" to further the overriding interest in public safety.²¹ Once that initial inquiry has been answered in the affirmative, the employer is required to show that age qualifications are reasonably *necessary* to the particular business, and not merely convenient or reasonable.²² To make that showing, the employer must show that it was compelled to rely on age as a proxy in determining a person's qualification for a job. This latter burden may be satisfied by establishing that there was a reasonable cause for believing that all or substantially all persons over the age qualification would be unable to perform the duties of the job safely and efficiently. The employer could alternatively establish age as a legitimate proxy by proving that it would be "impossible or highly impractical" to deal with the older employees on an individual basis.²³

Western contended that the *Tamiami* standard did not give sufficient deference to the airline's concern for passenger safety. It asserted as error the district court's rejection of its tendered instruction that would have allowed the BFOQ defense if there was a "rational basis in fact" for the defendant to believe that having flight engineers over age sixty would increase the risk to passengers.²⁴ Western's argument was rejected by the Ninth Circuit.²⁵

Before the Supreme Court, Western conceded that the *Tamiami* standard identifies the relevant general inquiries for applying a BFOQ test, but it urged the Court to modify the standard to accord greater weight to the public safety concern.²⁶ In arguing that the Court should adopt a more lenient standard for an employer asserting the BFOQ defense when public safety is involved, Western maintained that because the conflicting testimony of experts (here, medical experts) can never be resolved to a certainty and because public safety is at issue, a jury should be instructed to defer to the defendant's judgment in establishing job qualifications if they "are reasonable in light of the safety risks."²⁷ The Court rejected this "rational basis in fact" test, observing that Congress clearly intended to impose a "reasonably necessary"

²⁰531 F.2d 224 (5th Cir. 1976).

²¹*Id.* at 233.

²²*Id.* at 235.

²³105 S. Ct. at 2752.

²⁴*Id.* at 2755.

²⁵*Western Air Lines, Inc. v. Criswell*, 709 F.2d 544 (1983).

²⁶105 S. Ct. at 2753.

²⁷*Id.* at 2755-56.

standard.²⁸ Furthermore, the Court noted that a jury, in a close case, could be expected to err on the side of caution.²⁹ The Court adopted the *Tamiami* standard as "properly [identifying] the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety."³⁰

B. Affirmative Action

In June of 1984, the Supreme Court rendered a decision that is important to parties attempting to structure settlements in class action systemic discrimination cases. In *Firefighters Local Union No. 1784 v. Stotts*,³¹ the Court clarified the relationship between seniority systems and enforcement of consent decrees entered in employment discrimination lawsuits between cities and plaintiffs charging racial discrimination.

The *Stotts* case had its genesis in 1977 when Stotts, a black Memphis, Tennessee firefighter, filed a Title VII class action race discrimination suit against the city of Memphis. Stotts alleged that the Memphis Fire Department and the city were engaging in a pattern or practice of making hiring and promotion decisions on the basis of race.³² In 1980, the district court approved and entered a consent decree based upon a settlement agreed to by the city and the plaintiffs. As the Court noted, "the stated purpose of the decree was to remedy the hiring and promotion practices 'of the Department with respect to blacks.'"³³

Under the terms of the consent decree, the city, while not admitting any Title VII liability, agreed to promote thirteen individually named plaintiffs, to provide back pay to eighty-one fire department employees, and to adopt the long-term goal of increasing the proportion of minority employees in each job classification within the fire department to approximate the proportion of blacks in the labor force in that county.³⁴ No provision was made for dealing with layoffs or reductions in rank or for competitive seniority.³⁵ In approving the decree, the district court retained jurisdiction over the matter "for such further orders as may be necessary or appropriate to effectuate the purpose of this decree."³⁶

In 1981, the city of Memphis announced that budget deficits required layoffs of city employees that would be based on the "last hired, first fired" rule of seniority, pursuant to the seniority system contained in

²⁸*Id.* at 2756.

²⁹*Id.* at 2754.

³⁰*Id.* at 2753.

³¹104 S. Ct. 2576 (1984).

³²*Id.* at 2581.

³³*Id.* (citing *Stotts v. Memphis Fire Dept.*, 679 F.2d 541 (6th Cir. 1982)).

³⁴*Id.* at 2581.

³⁵*Id.*

³⁶*Id.* (citing 679 F.2d at 578).

the city's collective bargaining agreement with Firefighters Local Union No. 1784. At the request of Stotts and others, the district court entered a temporary restraining order forbidding the layoff of any black city employee.³⁷ The union, which had not been a party to the consent decree, intervened. After a hearing, the court issued a preliminary injunction prohibiting the city from applying its seniority policy insofar as it would decrease the percentage of blacks at various levels of employment.³⁸ The modified layoff plan implemented by the city in compliance with the court's order resulted in some non-minority employees with more seniority than minority employees being laid off or demoted.³⁹

The Sixth Circuit Court of Appeals affirmed the district court's action primarily on contract principles and the policy favoring settlements.⁴⁰ Although it disagreed with the district court's conclusion that the city's seniority system was not bona fide within the meaning of section 703(h) of Title VII,⁴¹ the circuit court nevertheless held that the injunction had done no more than enforce the terms of the previously agreed-upon consent decree.⁴² The circuit court also reasoned that because the decree permitted the district court to enter any later orders that "may be necessary or appropriate to effectuate the purposes of [the] decree," the city had agreed in advance to an injunction that would prohibit layoffs reducing the proportion of black employees.⁴³

On appeal, the Supreme Court reversed the Sixth Circuit.⁴⁴ The Court first rejected the argument that the case was moot, holding that the injunction continued to force the city of Memphis to disregard its seniority agreement in making future layoffs.⁴⁵

On the merits, the Court first rejected the Sixth Circuit's conclusion that the district court had merely enforced the express terms of the consent decree. Citing *United States v. Armour & Co.*,⁴⁶ the Court found, as had both lower courts, that the "four corners" of the decree did not provide for layoffs or demotions. The Court concluded that, absent some indication

³⁷*Id.* at 2582.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 561-62 (1982).

⁴¹Section 703(h) provides that:

it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a *bona fide seniority or merit system* . . . provided that such differences are not the result of an *intention to discriminate* because of race, color, religion, sex, or national origin

⁴² U.S.C. § 2000e-2(h) (1982) (emphasis added).

⁴³679 F.2d at 561-62.

⁴⁴*Id.* at 562-63.

⁴⁵104 S. Ct. at 2581.

⁴⁶*Id.* at 2583-85.

⁴⁶402 U.S. 673, 681-82 (1971).

that the parties intended to depart from the seniority system agreed to by the city and the union, it was improper to find that they had agreed in advance to the entry of an injunction disregarding that system.⁴⁷

The Court then addressed the argument that the district court's injunction was proper because it carried out the purposes of the consent decree. Emphasizing that the decree's purpose was to "remedy past hiring and promotion practices," the Court noted that, in implementing that remedy, the parties had not provided for the displacement of non-minority employees with greater seniority by blacks.⁴⁸ Finally, the Court noted that neither the union nor the non-minority employees had been parties to the action when the consent decree was entered and found it "highly unlikely" that the city would have purported to bargain away seniority rights in contravention of the agreement between the city and the union.⁴⁹ Thus, the city had no intention of departing from its seniority system when it agreed to the consent decree.⁵⁰

Having found no basis in the consent decree itself for the injunction, the Court then considered whether the district court had the inherent authority to modify the consent decree to prevent layoffs that might undermine the affirmative action outlined in the decree. The Sixth Circuit had held that the court's inherent authority did extend that far, even though the modification conflicted with the city's bona fide seniority system.⁵¹ The Supreme Court held that section 703(h) of Title VII requires that the city's seniority system be upheld absent evidence of an intent to discriminate.⁵² Both lower courts had found that there had been no intent to discriminate either in the seniority system as originally agreed to with the union nor in the layoff plan, which had merely followed the seniority system. Nor had the city admitted in agreeing to the consent decree that it had engaged in intentional discrimination. Therefore, the city had been justified in following its established seniority system.⁵³

The Sixth Circuit had reasoned that the district court had the power to override the seniority provisions to effectuate the consent decree because it would have had that power if the case had actually been tried and the plaintiffs had proved a pattern and practice of discrimination.⁵⁴ The Supreme Court took issue with the Sixth Circuit's reasoning. In a strongly-worded passage reinforcing its decision in *Teamsters v. United States*,⁵⁵ the Court concluded that the district court could not

⁴⁷104 S. Ct. at 2586.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹679 F.2d at 560-61.

⁵²104 S. Ct. at 2587.

⁵³*Id.* at 2586.

⁵⁴679 F.2d at 566.

⁵⁵431 U.S. 324 (1977).

properly have awarded competitive seniority, given the facts before the Court, even after a trial at which a pattern and practice of discrimination had been established.⁵⁶ The Court in *Teamsters* held that competitive seniority is an appropriate remedy only to individual class members who have demonstrated that they were actual victims of discrimination. Even with such a showing, a court must balance the equities to determine whether a non-minority employee with greater seniority should be laid off to make room for the discriminatee.⁵⁷ In this case, the Court found that there had been no showing that any of the blacks protected by the district court's injunction had been the actual victims of discrimination, nor had the parties identified any specific persons entitled to relief. Thus, the Court held, the court of appeals had awarded a greater remedy as an adjunct to settlement than the plaintiffs could have recovered if they had shown a pattern and practice of discrimination at trial.⁵⁸

Having held that the district court's injunction had been neither an enforcement of the terms of the consent decree nor a legitimate modification of the decree, the Court reversed the judgment of the court of appeals.⁵⁹ The Court specifically reserved the question whether the relief ordered by the district court would have been lawful as a voluntary remedy by the city in a consent decree or an affirmative action program.⁶⁰

The *Stotts* case has been more notable for its aftermath than for its holding. The Court's holding is that a district court cannot contravene a bona fide seniority system in enforcing a pattern and practice consent decree if the consent decree does not provide competitive seniority for minorities or address demotion or layoff of non-minority employees, particularly if the non-minority employees and their collective bargaining agent were not parties to the consent decree.

Shortly after *Stotts* was decided, however, the United States Department of Justice ("DOJ") sent letters to fifty local government jurisdictions subject to affirmative action provisions in judicial decrees. The letters requested the governments voluntarily to modify the consent decrees to eliminate racial hiring and promotion quotas in light of DOJ's interpretation of *Stotts*.⁶¹ DOJ's overly broad reading of *Stotts* to prevent all voluntary preferential hiring provisions has met with little success. For example, in *United States v. Albrecht*,⁶² the court held that *Stotts* does not require the replacement of a consent decree with one deleting hiring goals.⁶³

⁵⁶104 S. Ct. at 2587-88.

⁵⁷431 U.S. at 371-76.

⁵⁸104 S. Ct. at 2588.

⁵⁹*Id.* at 2590.

⁶⁰*Id.*

⁶¹See NAACP Legal Defense Fund v. United States Department of Justice, 612 F. Supp. 1143 (D.D.C. 1985).

⁶²38 Empl. Prac. Dec. (CCH) ¶ 35,512 (N.D. Ill 1985); accord *United States v. City of Buffalo*, 38 Empl. Prac. Dec. (CCH) ¶ 35,545 (W.D.N.Y. 1985).

⁶³38 Emp. Prac. Dec. (CCH) ¶ 35,512 at 39,220-21.

The Seventh Circuit Court of Appeals recently distinguished *Stotts* in a suit challenging a collective bargaining agreement that prohibited layoffs of minority teachers.⁶⁴ In that case, there had been findings of discrimination in both judicial and administrative proceedings. The contract did not require that white teachers be laid off or that their advancement be blocked by the layoff prohibition. The court distinguished *Stotts* by noting that, unlike *Stotts*, neither court-ordered affirmative action nor the override of a good faith seniority system was involved.⁶⁵

C. A State's Accommodation of Religious Worship

In *Thornton v. Caldor, Inc.*,⁶⁶ the Supreme Court struck down a Connecticut statute providing employees the absolute right not to work on their chosen Sabbath. The plaintiff's decedent, a Presbyterian who observed a Sunday Sabbath, was the manager of a department store and was required to work every third or fourth Sunday. He initially complied with the obligation, but later refused and invoked the protection of the statute. The employer offered to transfer him to a store in another state that was closed on Sunday or to give him a non-supervisory position at lower pay. The plaintiff rejected these offers and the employer subsequently transferred him to a clerical position. The employee then resigned and filed a grievance with the Connecticut Board of Mediation and Arbitration.⁶⁷ The Board and reviewing court rejected the defendant's argument that the Connecticut statute violated the Establishment Clause of the first amendment.⁶⁸ The Connecticut Supreme Court, however, invalidated the statute, finding that it did not have a "clear secular purpose."⁶⁹

The United States Supreme Court, with little hesitation or discussion, affirmed the state supreme court.⁷⁰ Applying the test enunciated in *Lemon v. Kurtzman*,⁷¹ the Court ruled that the statute's "unyielding weighting in favor of Sabbath observers over all other interests" contravened a

⁶⁴*Britton v. South Bend Community School Corp.*, 38 Emp. Prac. Dec. (CCH) ¶ 35,679 (7th Cir. 1985).

⁶⁵*Id.* at 40,046-47. A number of jurisdictions have similarly distinguished *Stotts*. See *Deveraux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985); *EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 485-89 (6th Cir. 1985); *Diaz v. American Telephone & Telegraph Co.*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-26 (11th Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984).

⁶⁶*Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985).

⁶⁷*Id.* at 2915-17.

⁶⁸*Id.* at 2916-17.

⁶⁹*Caldor, Inc. v. Thornton*, 191 Conn. 336, 349, 464 A.2d 785, 793 (1983).

⁷⁰105 S. Ct. at 2917.

⁷¹403 U.S. 602, 619 (1971).

fundamental principle of the first amendment and that the statute went beyond having an incidental or remote effect of advancing religion.⁷²

II. SEVENTH CIRCUIT DECISIONS

A. Sexual Harassment

In *Horn v. Duke Homes*,⁷³ the Seventh Circuit addressed the extent of an employer's liability under Title VII for sexual harassment by a supervisory employee. Horn, a former employee of Duke Homes, filed suit alleging that she was terminated as a result of her refusal to submit to the sexual advances of Frank Haas, Duke's plant superintendent.⁷⁴

At the trial court, Horn testified that Haas' sexual advances began several months after she was hired by Duke Homes. The advances included leers, obscene gestures, lewd comments, remarks about her sexual needs, and promises that he would make it "easy" for her at Duke if she would "go out" with him. Following Horn's rejection of these advances, Haas orally reprimanded her for allegedly substandard work, then transferred her to another section. A week later, Haas called her into his office and terminated her. Horn's testimony was corroborated by a male witness who testified that he had overheard one of Haas' remarks to Horn and by three former female employees of Duke who described similar advances by Haas.⁷⁵

Haas denied harassing Horn and testified he had terminated her for poor job performance related to her marital problems. There was testimony that Horn had complained to Haas' supervisor after her termination about Haas' advances. After an apparently perfunctory investigation, he had concluded Haas' authority to hire and fire should not be interfered with.⁷⁶

The district court credited Horn and her witnesses and concluded that Haas had sexually harassed Horn.⁷⁷ Additionally, the court found that the complaints about Horn's work performance were pretextual, and that, therefore, no legitimate cause for Horn's termination had been shown.⁷⁸ He found that consent to Haas' sexual advances had been made a condition of Horn's employment in violation of her Title VII rights.⁷⁹

On appeal, Duke did not challenge the district court's findings of fact. Rather, it argued that there is no cause of action under Title VII

⁷²105 S. Ct. at 2918.

⁷³755 F.2d 599 (1985).

⁷⁴*Id.* at 601.

⁷⁵*Id.* at 601-02.

⁷⁶*Id.* at 602.

⁷⁷*Id.* at 602-03.

⁷⁸*Id.*

⁷⁹*Id.*

for sexual harassment. In the alternative, Duke contended that it should not be held liable for Haas' behavior "because the district judge found that the supervisory hierarchy above Haas neither knew nor approved of Haas' sexual misconduct."⁸⁰

The Seventh Circuit gave short shrift to Duke's first contention. It held that "sexual consideration constitutes precisely the kind of 'artificial, arbitrary, and unnecessary barrier[] to employment' that Title VII was intended to prevent." The court reasoned that, because Haas would not have demanded sex as a condition of employment if Horn had not been a woman, Horn was disadvantaged on the basis of her sex.⁸¹

In response to Duke's second argument, the Seventh Circuit held actual or constructive knowledge by the employer to be unnecessary to a finding of employer liability for a supervisor's conduct.⁸² The court adopted the strict liability standard articulated by the EEOC in its Guidelines on Sexual Harassment. The court noted that "every circuit that has reached the issue has adopted the EEOC's rule"⁸³

The court advanced several reasons for its adoption of the strict liability rule. First, the court responded to Duke's rhetorical question, "How can a company be held responsible for such actions unless it is notified of them?" The court answered that the "company" is merely a legal fiction that can only act through its appointed agents. Here, the court observed, where the supervisor was given absolute authority to hire and fire, the supervisor was the company for all intents and purposes.⁸⁴

Second, the court discussed application of the doctrine of respondeat superior in the context of these facts. It noted that the policy rationale in favor of respondeat superior liability rests primarily in risk allocation: "the employer, not the innocent plaintiff, should bear the cost of the torts of its employees as a required cost of doing business, insofar as such torts are reasonably foreseeable and the employer is a more efficient cost avoider than the injured plaintiff."⁸⁵ Duke had attempted to avoid respondeat superior liability by arguing Haas acted outside the scope of his employment. The court rejected that argument, noting that the complained-of harassment arose out of Haas' performance of his supervisory duties. Therefore, the court reasoned, so long as the tort was caused by the exercise of the supervisory power delegated to him, public policy justified limiting the scope of employment exception to respondeat superior liability.⁸⁶

⁸⁰*Id.* at 603.

⁸¹*Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

⁸²*Id.* at 604.

⁸³*Id.* The Court relied on the EEOC guideline set out at 29 C.F.R. § 1604.11(c) (1985).

⁸⁴755 F.2d at 604-05.

⁸⁵*Id.* at 605.

⁸⁶*Id.*

Returning from its sojourn into the common law of agency, the court determined that adoption of a strict liability rule was warranted given Congress' desire that employers bear under Title VII the cost of remedying and eradicating employment discrimination.⁸⁷ The court noted that sexual harassment is the only Title VII context in which employers have not routinely been held strictly liable for discriminatory behavior of their supervisors.⁸⁸

A secondary issue in *Duke Homes* was the propriety of the district court's denial of back pay to the plaintiff.⁸⁹ The district judge had asserted that he had discretion to deny back pay and that he deemed the record inadequate for an award in this case.⁹⁰ The Seventh Circuit reversed on this issue, saying that it was Congress' intent that back pay be awarded absent special factors, those special factors being limited to circumstances " 'where state legislation is in conflict with Title VII.' " The court added that the employer's good faith and lack of specific intent to discriminate did not constitute a special factor justifying denial of back pay.⁹¹

Horn v. Duke Homes is significant not only for the questions it answers, but also for the issues it leaves open. The court clearly limited its holding to those cases in which an employee with substantial supervisory authority imposes sexual consideration as a condition of employment.⁹² It specifically disclaimed that its holding applied to acts of sexual harassment by nonsupervisory co-employees.⁹³ In addition, it would appear that the court's holding is not meant to apply in "hostile environment" sexual harassment cases.⁹⁴ *Horn v. Duke Homes* is a *quid*

⁸⁷*Id.* at 605-06.

⁸⁸*Id.* at 605 (citing Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 540 (1981); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1025 (1978)).

⁸⁹755 F.2d at 606.

⁹⁰*Id.* (citing Transcript of Proceedings at 320).

⁹¹*Id.* at 606-08 (citing cases).

⁹²*Id.* at 603.

⁹³*Id.* at 603 n.2. The EEOC approves the application of a "knew or should have known" standard in co-employee harassment situations. 29 C.F.R. § 1604.11(d) (1985). *Accord* Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Hinson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

⁹⁴Many courts and commentators have adopted the terms "hostile environment" or "work environment" and "quid pro quo" to describe the different types of sexual harassment. The former refers to the third division in the EEOC's definition of sexual harassment: " 'an intimidating, hostile [and] offensive work environment.' " Katz, 709 F.2d at 255 (citing 29 C.F.R. § 1604.11(a)(3)). Usually no back pay is sought by the plaintiff, who is still at work. Frequently co-employees will be the offending parties. "Quid pro quo" refers to the kind of sexual harassment in which a plaintiff suffers some kind of tangible job detriment, such as demotion or discharge, as a result of rejection of sexual demands. *See, e.g.,* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

pro quo case: Horn rejected Haas' advances and as a result lost her job. The court apparently used the term "condition of employment" to refer to the adverse consequences that resulted from Horn's rejection of Haas' advances. Thus, the court rejected Duke's argument that the district court had found the advances created an intolerable atmosphere and were not the cause of her termination. It noted the district court's finding that "Haas demanded sex as a condition of employment."⁹⁵

Horn v. Duke Homes therefore apparently does not require the application of the strict liability standard in hostile environment cases. Some courts presented with that issue have applied a "knew or should have known" standard.⁹⁶ The United States Supreme Court will have an opportunity to address the strict liability issue, particularly as it relates to employees with minimum supervisory power and hostile environment situations, in *PSFS Savings Bank v. Vinson*.⁹⁷

B. Tolling of the Statute of Limitations

Section 706(f)(1) of Title VII⁹⁸ requires a plaintiff to file his or her complaint within ninety days of receiving a right-to-sue notice from the EEOC. In *Brown v. J.I. Case Co.*,⁹⁹ the Seventh Circuit recognized that certain efforts of the plaintiff may toll the statute of limitations.

On July 27, 1981, the plaintiff (Brown) received a notice of right to sue from the EEOC stating that his Title VII charge had been dismissed by the EEOC for lack of reasonable cause to believe Brown's allegations of racial discrimination. Eighty-eight days after receiving this notice, Brown filed several documents with the Court for the Southern District of Indiana: (1) an affidavit of financial status in civil actions, (2) a financial affidavit in support of request for an attorney, (3) a pauper affidavit and order, and (4) the notice of right to sue.¹⁰⁰ The first form included an outline of the plaintiff's futile attempts to secure representation and a request for court-appointed counsel. The pauper affidavit and order contained Brown's sworn statement that he was unable to pay court costs and an order requiring only the district judge's signature to authorize Brown's proceeding *in forma pauperis*. Nearly two years later, the court denied Brown's request to proceed as a pauper but did not mention his request for court-appointed counsel. One month following this order, Brown filed his complaint *pro se* and also asked that the

⁹⁵755 F.2d at 606 n.9. Some courts have held that a hostile environment can be a condition of employment. See, e.g., *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

⁹⁶See, e.g., *Katz*, 709 F.2d at 255-56; *Bundy*, 641 F.2d at 943.

⁹⁷*Cert. granted*, 106 S. Ct. 57 (1985).

⁹⁸42 U.S.C. § 2000e-5(f)(1) (1982).

⁹⁹756 F.2d 48 (1985).

¹⁰⁰*Id.* at 48-49.

court rule on his still-pending request for counsel and reconsider its earlier decision. The district court denied both of these requests.¹⁰¹

The district court later also granted the defendant's motion to dismiss on the ground that the complaint was time-barred. In so ruling, the district court rejected Brown's argument that the filing of an application for appointment of counsel, accompanied by the EEOC notice of right-to-sue letter, tolled the ninety-day filing period.¹⁰² The court also held that the papers filed by Brown within the ninety-day period did not constitute the filing of a complaint.¹⁰³

The Seventh Circuit overturned the district court's ruling on the first argument; it therefore found it unnecessary to express an opinion on the latter.¹⁰⁴ The court used this occasion to clarify its earlier holding in *Harris v. National Tea Company*.¹⁰⁵ In *Harris*, the plaintiff had filed a petition for appointment of counsel six days after receipt of notice of right to sue. The court denied the request the next day. The plaintiff made a second petition thirty-six days following receipt of notice of right to sue, which was six days after the running of the thirty-day limitations period that existed at that time.¹⁰⁶ The court granted the second petition and vacated its earlier order. The Seventh Circuit interpreted the granting of the second request as a recognition by the trial court that it had earlier erred and therefore ruled that the running of the limitations period was tolled when the first request was improperly denied.¹⁰⁷

In *Brown*, the circuit court declared that its holding in *Harris* should not be so narrowly read as to apply only where there has been an erroneous denial of appointed counsel.¹⁰⁸ Instead, it embraced *Harris* as standing "for the general proposition that the filing or initiation of a request for appointed counsel tolls the running of the limitations period until the court acts upon the request."¹⁰⁹

In its opinion, the *Brown* court emphasized that the remedial purpose of Title VII was served by tolling the statute of limitations in special equitable circumstances such as those raised by the plaintiff.¹¹⁰ The court further noted that tolling would not be appropriate in the absence of equitable circumstances or where the plaintiff lacked due diligence.¹¹¹

¹⁰¹*Id.* at 49.

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵454 F.2d 307 (1971).

¹⁰⁶42 U.S.C. § 2000e-5(e) (1964), amended by Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972).

¹⁰⁷454 F.2d at 310.

¹⁰⁸756 F.2d at 50.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 50-51.

¹¹¹*Id.* at 51.

C. Use of Statistics

In *Coates v. Johnson & Johnson*,¹¹² the Seventh Circuit Court of Appeals discussed at great length the proper use of statistics in a class action alleging a pattern or practice of disparate treatment. The court of appeals found fault with the district court's handling of statistical evidence¹¹³ but nevertheless affirmed the holding for the defendant.¹¹⁴

1. *Background of the Case.*—The named plaintiff, Wesley Coates, originally filed an individual charge of racial discrimination with the EEOC after he was discharged by the defendant, Johnson & Johnson, for sleeping on the job. Coates had just been reinstated from a suspension for damaging company property. The court of appeals noted that company officials decided not to lessen his punishment because an undercover investigator working inside the Johnson & Johnson plant reported that Coates was selling drugs on company property.¹¹⁵

Coates' complaint was later amended to allege class discrimination under Title VII¹¹⁶ and to add a count alleging individual and class discrimination under 42 U.S.C. section 1981.¹¹⁷ He contended that he and over two hundred other blacks were discharged "as a consequence of a uniform policy and practice to reduce black employment and discriminatorily discharge black employees at defendants' plant."¹¹⁸ The district court later certified the class, and in the words of the appellate court, "Coates, a somewhat less than exemplary employee, became the named class representative."¹¹⁹

The primary issues in this case involved the disciplinary system for the wage employees at Johnson & Johnson's midwest diaper plant, which was constructed in 1973 and closed in 1981 for financial reasons. The class complaint alleged an articulated plan to reduce the number of blacks at the plant and a "highly discretionary discipline-discharge-reinstatement system under which blacks were treated less favorably than whites."¹²⁰ Under the defendants' system, first-line supervisors, a group that the court noted included a significant percentage of blacks, had direct responsibility for meting out discipline. The system provided for a grievance procedure to the plant manager (a position held after 1976 by a black) who could uphold or reverse the disciplinary action.¹²¹ As

¹¹²756 F.2d 524 (1985).

¹¹³*Coates v. Johnson & Johnson*, 28 Empl. Prac. Dec. (CCH) ¶ 32,664 (N.D. Ill. 1982).

¹¹⁴756 F.2d at 530.

¹¹⁵*Id.* at 529-30.

¹¹⁶42 U.S.C. §§ 2000e-2000e-17 (1982).

¹¹⁷42 U.S.C. § 1981 (1982).

¹¹⁸756 F.2d at 530 (quoting complaint).

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.* at 529.

the court noted, this disciplinary procedure necessarily allowed those involved in the process a measure of discretion.¹²²

At trial before the Northern District of Illinois, the plaintiffs presented statistical and anecdotal¹²³ evidence to support their claim that the defendants had engaged in a pattern or practice of discriminatorily firing blacks. The district court found that the plaintiffs' evidence was adequately rebutted by the defendants and that the plaintiffs failed to meet their burden of persuasion.¹²⁴ The most significant issues raised before the Seventh Circuit involved the class, rather than the individual, claims of racial discrimination.

2. *Individual v. Class Disparate Treatment*.—The first issue addressed by the Seventh Circuit was the plaintiffs' contention that the district court erred

by confusing the kind of evidence required to rebut a private, non-class disparate treatment prima facie case with that sufficient to rebut a government or class pattern or practice disparate treatment prima facie case.¹²⁵

The plaintiffs argued that the defendants could not rebut the class-wide statistics offered by the plaintiffs merely by articulating a non-pretextual reason for the discharge of every named class representative or other class members who testified. In other words, the plaintiffs claimed that the district court had treated the matter as a group of individual lawsuits rather than as a class claim.¹²⁶

The court of appeals began by setting out the elements of the class case articulated by the Supreme Court in *International Brotherhood of Teamsters v. United States*.¹²⁷ Applying *Teamsters*, the court of appeals agreed that explaining the discharge of every named class representative or others testifying would not be enough to defeat a class claim.¹²⁸ The court concluded, however, that the district judge had properly weighed other evidence as well in determining that the defendants had rebutted the plaintiffs' prima facie case.¹²⁹

3. *The Statistical Evidence*.—Most of the issues on appeal revolved around the proper components and methodology for the utilization of statistics by both the plaintiffs and the defendants. The plaintiffs' expert initially presented a study showing that the discharge rate from 1973 to

¹²²*Id.*

¹²³"Anecdotal" evidence refers to specific evidence regarding the actions of the parties, in contrast to statistical evidence.

¹²⁴28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,036-37.

¹²⁵756 F.2d at 530.

¹²⁶*Id.* at 533.

¹²⁷431 U.S. 324 (1977).

¹²⁸756 F.2d 533.

¹²⁹*Id.*

1981 for black employees was almost twice as high as that for white employees. The expert then refined these rates to determine if factors other than race were responsible for the disparity. In this study, termed a "survival analysis,"¹³⁰ the expert controlled for seniority, education, experience prior to hiring, sex, and absences and tardiness.¹³¹ In this analysis, he found a disparity significant at the fourth standard deviation level.¹³²

The defendants offered their own expert statistician who presented his own statistical study of the discharge rates and also made several criticisms of the plaintiffs' statistical analyses. The defendants' expert used a somewhat different definition of "discharge" and also analyzed the data on a yearly basis rather than aggregating or "pooling" it over the years covered by the class suit, as the plaintiffs had done. Rather than a survival analysis, the defendants' expert conducted a multiple regression analysis¹³³ to allow for the same non-discriminatory variables that the plaintiffs had. However, the defendants' expert also included a variable that took into account formal disciplinary actions taken within the twelve months prior to the discharge. From this analysis, he concluded that the differences in discharge rates were not attributable to race but to the employment history of the individual employee, primarily the previous disciplinary actions.¹³⁴

The defendants' expert also criticized the plaintiffs' study for a number of reasons, among them that: (1) the data was pooled over the entire seven-year period rather than analyzed year-by-year; (2) the study included data from 1973, a year prior to the class period; and (3) the data did not include the employees' prior disciplinary records.¹³⁵

The plaintiffs' expert conducted additional, last-minute studies in response to these criticisms. He argued that including data from 1973 was entirely appropriate in discerning pattern or practice discrimination culminating with discharges beginning in 1974. He also performed a log linear analysis indicating that pooling the data was appropriate. Even when employing a year-by-year analysis, he still found a statistically significant disparity in discharge rates in three of the seven years. He also argued strongly that using an employee's disciplinary record as a relevant variable was entirely improper because disciplinary actions were

¹³⁰*Id.* at 537 n.12. The expert employed the survival analysis, a technique for refining statistical data, rather than the more commonly-used multiple regression analysis. *Id.*

¹³¹According to the plaintiffs' expert, absences and tardiness were the only objective indicators of an employee's reliability. *Id.* at 537.

¹³²*Id.* The Supreme Court has held that a disparity greater than "two or three" standard deviations is suspect. *Castaneda v. Partida*, 430 U.S. 483 (1976).

¹³³Multiple regression analysis is a method of refining statistical data by estimating the effects of several independent factors on a single dependent variable. *Id.* at 538 n.14.

¹³⁴*Id.* at 538.

¹³⁵*Id.*

subject to the same discriminatory bias as that involved in the discharges.¹³⁶ Even so, the plaintiffs' expert analyzed the data taking prior disciplinary actions into account, except that he took into account an employee's entire disciplinary history rather than that of only the twelve months prior to discharge. He found a statistically significant disparity in discharge rates when the data was pooled over the class period.¹³⁷

The district court, apparently exasperated over the volume of the statistics and the differing methodologies, concluded that "the statistical evidence presented by the parties has not been helpful to this court."¹³⁸ In sum, though, the district court agreed with the defendants' criticisms of the plaintiffs' analyses and therefore discounted the probative value of the plaintiffs' statistical evidence.¹³⁹

4. *The Value of Statistical Evidence.*—The court of appeals acknowledged the problems that a trial court faces in interpreting statistical evidence when experts for each side formulate their analyses using different theories and then factor in or out different variables. The court, however, articulated some concern over the district court's reluctance to accord the statistical evidence much probative value. The court noted the Supreme Court's approval of statistical proof in *Teamsters* and cited a number of cases in which the court relied on statistical evidence as the best means of showing the cumulative effects of employment actions.¹⁴⁰

The court of appeals next narrowed its review of the district court's treatment of the statistical evidence to three issues:

- (1) Whether pooling of the data is appropriate;
- (2) Which party bears the burden of persuasion on the issue of whether a variable is tainted by past discrimination; and
- (3) What is the appropriate measure of disciplinary history.¹⁴¹

5. *Pooling of Data.*—At trial, the plaintiffs submitted into evidence the results of their expert's log linear test indicating that pooling of the data was appropriate. They therefore argued on appeal that it was clearly erroneous for the district court to find that pooling was inappropriate.¹⁴² The plaintiffs cited *Capaci v. Katz & Besthoff, Inc.*¹⁴³ as rejecting the argument that data must be analyzed in year-by-year samples. The court of appeals was unconvinced; it distinguished *Capaci* by pointing out that it involved much smaller data samples that would be unlikely to yield

¹³⁶*Id.*

¹³⁷*Id.* at 539.

¹³⁸28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,035.

¹³⁹*Id.* at 25,026-31.

¹⁴⁰756 F.2d at 539-40.

¹⁴¹*Id.* at 540.

¹⁴²*Id.* at 541.

¹⁴³711 F.2d 647 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1709 (1984).

findings of statistical significance unless aggregated.¹⁴⁴ The court further distinguished *Capaci* by pointing out that Johnson & Johnson's expert testified that he had performed a Chow test¹⁴⁵ that indicated that it was statistically inappropriate to pool the data.¹⁴⁶ Therefore, the district court was left to decide whether the plaintiffs' log linear or the defendants' Chow test was better. The circuit court concluded that the pooling issue presented a close question, but that it could not say that the district court's preference for the defendants' proof was clearly erroneous.¹⁴⁷

6. *Past Disciplinary Action as Variable*.—At trial, the defendants attempted to show that there was a factor other than race — an employee's prior disciplinary record — that explained the statistical disparity in discharge rates. The plaintiffs objected to prior disciplinary action as an independent variable, contending that the company also discriminated in discipline and therefore should not have been able to use a potentially biased factor as a nondiscriminatory explanation for the disparity in discharge rates without first showing that the factor was unbiased.¹⁴⁸

The court of appeals characterized the question presented as an issue of which party bears the burden of persuasion regarding possibly biased factors in the defendant's rebuttal evidence.¹⁴⁹ After characterizing it as such, the court then went on to distinguish decisions maintaining that a defendant cannot rely on factors that the court concludes are biased, on the ground that these decisions had not addressed the burden question.¹⁵⁰ The circuit court determined that, consistent with the principle that the plaintiffs in a Title VII case bear the ultimate burden of persuasion on the issue of discrimination,¹⁵¹ "once a defendant offers statistics using an allegedly biased factor, the plaintiff must bear the burden of persuading the factfinder that the factor is biased."¹⁵²

Given this allocation of burdens, the plaintiffs had the burden of persuading the court that Johnson & Johnson's disciplinary system allowed supervisors to discriminate and that the supervisors had indeed discriminated. The court cited the lack of direct statistical evidence on that issue as a factor that greatly weakened the plaintiffs' case.¹⁵³

7. *Appropriate Measure of Disciplinary History*.—The third issue addressed by the court of appeals involved the appropriate measure of

¹⁴⁴756 F.2d at 541.

¹⁴⁵See *id.* at 541-42 n.18. The Chow test analyzes the relationships between all of the variables in the statistical model. The log^{*} linear test employed by the plaintiffs' expert considers only some of the variables. See *id.* at 542.

¹⁴⁶*Id.* at 541.

¹⁴⁷*Id.* at 542.

¹⁴⁸*Id.* at 542-43.

¹⁴⁹*Id.*

¹⁵⁰*Id.* at 543-44.

¹⁵¹See *Segar v. Smith*, 738 F.2d 1249, 1284 (D.C. Cir. 1984).

¹⁵²756 F.2d at 544.

¹⁵³*Id.* at 545. The concurring judge objected to a mechanical shifting of this burden to the plaintiff. He contended that "[w]hen discrimination in the explanatory factor is

an employee's disciplinary history. The defendants' expert performed a multiple regression analysis that incorporated an employee's disciplinary record for the twelve months preceding discharge as an independent variable.¹⁵⁴ When the plaintiffs' expert, on the other hand, included the employee's *entire* disciplinary record, he found a statistically significant disparity in discharge rates between blacks and whites.¹⁵⁵

The district court found that the defendants' twelve-month variable was more accurate and therefore discounted the plaintiffs' proof.¹⁵⁶ The circuit court found this to be clearly erroneous but reasoned that it was not reversible error because the district court had not placed much reliance on the parties' statistical evidence anyway.¹⁵⁷

The court first compared the two studies and found that use of the entire disciplinary record "seemed to improve the results of the statistical analysis."¹⁵⁸ Second, the court criticized the twelve-month time frame dating back from the employee's discharge because it could leave out relevant disciplinary actions. A better method, according to the court, would have been to define the record in terms of the twelve-month period prior to the last, if any, *discipline* the employee had received.¹⁵⁹ Finally, the court observed that the company utilized a "whole man" concept of discipline that involved review of an employee's entire file in meting out discipline.¹⁶⁰

The Seventh Circuit's decision in *Coates* is noteworthy for a number of reasons. First, it affirms the importance of statistics in Title VII disparate treatment cases and suggests that a trial court is not free to ignore statistics simply because they are methodologically confusing. Second, however, the decision demonstrates that the appellate court will accord a great degree of deference to the trial court's interpretation of statistical data. Finally, the court's placing of the burden on the plaintiff to show discriminatory bias in the defendant's rebuttal factor may prove to be practically significant.

alleged, a failure to present evidence either way should ordinarily work against the defendant." He agreed with the result, however, finding that the plaintiffs failed to meet their ultimate burden of persuasion. *Id.* at 554 (Cudahy, J., concurring).

¹⁵⁴*Id.* at 545-46.

¹⁵⁵*Id.* at 539.

¹⁵⁶*Id.* at 545-46.

¹⁵⁷*Id.* at 546-47. The concurring judge was troubled by the majority's treatment of this issue. He found it "odd" that the reviewing court would find the district judge's acceptance of the defendants' measure of disciplinary history clearly erroneous but then excuse it because the district judge had not found the statistical evidence particularly helpful. The concurring judge suggested that the better procedure might be to remand to see if the district judge would find the evidence helpful when he does take it into account. *Id.* at 555 (Cudahy, J., concurring).

¹⁵⁸*Id.* at 546.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

Teacher Collective Bargaining

JANET L. LAND*

During the past year, two courts of separate jurisdiction focused attention on teacher bargaining questions arising out of unfair practices in the Union County School Corporation. In *Union County School Corporation Board of School Trustees v. Indiana Education Employment Relations Board*,¹ the Indiana Court of Appeals addressed the substantive issues of whether a school corporation is required to discuss or bargain about make-up school days for teachers and the adoption of a school policy concerning school closings. The first issue had been addressed by the court of appeals in *Eastbrook Community School Corporation v. Indiana Education Employment Relations Board*.² In *Eastbrook*, the court held that school calendars are nonnegotiable matters of educational policy, not mandatory subjects of bargaining under the Certified Educational Employee Bargaining Act ["CEEBA"], and that a contingency clause in the parties' collective bargaining agreement did not have such a direct and substantial impact upon salary, wages, hours, and related benefits as to mandate bargaining.³ Because the school board in *Eastbrook* had discussed the issue of make-up school days with the exclusive representative, the court did not address the issue of whether requiring teachers to provide services on days other than those contemplated within the normal school year constituted a working condition which would require discussion under the CEEBA.

Union County dealt not only with the question of bargaining but also with discussion relating to making up school days. The facts in *Union County* are unique in that Union Elementary School is located on the Indiana and Ohio state line with part of the building in Indiana and part of the building in Ohio. Students who attend the school are residents of either Indiana or Ohio.⁴ Union County and College Corner,

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¹471 N.E.2d 1191 (Ind. Ct. App. 1984).

²446 N.E.2d 1007 (Ind. Ct. App. 1983).

³*Id.* at 1013.

⁴OHIO REV. CODE § 3313.42 and IND. CODE § 20-4-56-1, both enacted in 1921, provided for the establishment of a joint school between a school corporation in the state and an adjacent school corporation in another state. On August 14, 1961, the Boards of Education for Union County and the College Corner Local School District held a joint meeting at which policies were adopted which had the effect of establishing a formal Joint Board of Education. Again on July 21, 1964, the parties entered into another written agreement recognizing the Joint Board and reiterating the policies as adopted at the 1961 joint meeting. In *College Corner Local School Dist. v. Union County School Corp.*, No. 64-2994 (S.D. Ohio Nov. 3, 1964), the district court recognized the Joint Board as a legal

the two school corporations involved, pay a proportionate share of the teachers' salaries based on the respective percentages of students from Indiana and Ohio who are enrolled in Union Elementary. During the 1977-78 school year, Union Elementary was closed for nineteen days because of inclement weather. Teachers were required to make up seven days, and the students were required to make up eleven days.⁵ The teachers at Union Elementary received no additional pay from Union County for the additional days, and they were the only teachers in the Union County School Corporation who were required to make up school days. In the past, the Union County School Corporation had issued supplemental contracts to the teachers who had been required to work additional contract days at Union Elementary School. Teachers had been provided payments in an amount equal to the Indiana share of the total daily rate for each of the make-up days.⁶

At a meeting of the Joint Union School Board in December 1978, the Board adopted a school closing policy whereby Union Elementary School would remain open as long as the Ohio school buses were operating. During the 1978-79 school year, Union County schools were closed for six days because of inclement weather, except for Union Elementary, which remained open on these days in accordance with the school closing policy as adopted by the Joint Union School Board in December 1978.

The president of the National Education Association-Union County filed a complaint for unfair practice with the Indiana Education Employment Relations Board ("IEERB"), alleging that the Indiana and Ohio local school corporations had unilaterally changed the pay procedures for the make-up of snow days in Union Elementary School and had unilaterally implemented a new school closing policy. The hearing examiner concluded that the Joint Union School Board and the Union County School Corporation committed unfair practices under the CEEBA⁷ by failing to bargain or discuss the scheduling of make-up days and the school closing plan. Accordingly, the examiner recommended an order that the two employers cease and desist from refusing to bargain about these wages⁸ and from refusing to discuss with the teachers' exclusive representative changes in the school calendar.⁹ In addition, the examiner

entity; however, the court held that one local school district could not change the operation and procedure without the consent and agreement of the other local school district. *Union County*, 471 N.E.2d at 1194 n.1.

⁵Ohio law requires 182 student days, OHIO REV. CODE § 3313.48 (1980), for funding eligibility from the state of Ohio unless waived by the Ohio Superintendent of Public Instruction. See OHIO REV. CODE § 3317.01 (1980).

⁶471 N.E.2d at 1194.

⁷See IND. CODE § 20-7.5-1-7(a)(1), (a)(5), and (a)(6) (1982).

⁸See *id.* § 20-7.5-1-4 (1982).

⁹*Id.* § 20-7.5-1-5(a) (1982).

recommended that the two employers be ordered to pay the teachers supplemental wages. The IEERB subsequently issued its decision and order, which adopted the hearing examiner's findings of fact and conclusions of law. The trial court then affirmed the decision and order.¹⁰

In determining whether the school employer had a duty to bargain about make-up school days and the school closing plan adopted in December 1978, the *Union County* court was guided by the decision in *Eastbrook*.¹¹ It concluded, as had the court in *Eastbrook*, that "make-up days which do not change the amount of time the teachers agreed to teach '[do] not have such a direct and substantial impact upon salary, wages, hours and salary and wage related benefits' as to mandate bargaining."¹² The court rejected the teachers' argument that the school employer's past practice of issuing supplemental contracts to the teachers in Union Elementary for make-up school days elevated the issue to a mandatory subject of bargaining.¹³ In reaching that conclusion, the court reasoned that both the scheduling of the make-up days in the 1977-78 school year and the adoption of the school closing policy were within the school employer's management prerogative¹⁴ as well as the *Eastbrook* decision.¹⁵

Because the exclusive representatives and the school employers in *Eastbrook* and *Union County* did not have grandfathered collective bargaining agreements,¹⁶ neither court considered what effect, if any, a grandfathered calendar would have on bargaining about make-up school days.

Union County expanded the *Eastbrook* decision because the question of whether the school employer had a duty to discuss the scheduling of make-up school days had not been before the *Eastbrook* court. The court in *Union County*, after concluding that the scheduling of make-up days and the school closing plan were "working conditions" for which the statute mandates discussion,¹⁷ held that "the existence of the past practice of issuing supplemental contracts to the [Union Elementary School] teachers during the 1976-77 school year placed the duty to initiate discussion as to the issue of make-up days of 1977-78 on the Em-

¹⁰471 N.E.2d at 1195.

¹¹446 N.E.2d at 1007.

¹²471 N.E.2d at 1197 (quoting *Eastbrook*, 446 N.E.2d at 1013).

¹³*Id.* at 1198.

¹⁴*Id.*

¹⁵See IND. CODE § 20-7.5-1-6(b) (1982).

¹⁶The proviso in IND. CODE § 20-7.5-1-5(a) (1982) states, "[A]ny items included in the 1972-73 agreements between any employer school corporation and the employee organization shall continue to be bargainable." Grandfathered agreements are those which remain in effect and permit the parties to continue acting as agreed despite a subsequent law or regulation which normally would restrict such actions.

¹⁷IND. CODE § 20-7.5-1-5(a) (1982).

ployers.”¹⁸ Consequently, the duty to initiate discussion concerning the scheduling of make-up school days lay with the school employers because it was reasonable for the teachers to rely on the past practice of receiving pay for the additional days.

On the other hand, the court reached a different conclusion with respect to the school closing plan and the school employers’ duty to initiate discussion. Regarding this issue, the court held that the school employers did not act unfairly when the school closing plan for inclement weather during the 1978-79 school year was enacted without prior discussion with the exclusive representative.¹⁹ Thus, the burden of initiating or requesting discussion is on the exclusive representative whenever policy changes concern matters of general interest to the school community as a whole.

The court in *Union County* noted that fifty-two days had transpired between the time the school closing policy had been adopted and its implementation.²⁰ Yet, from the time of adoption to the time of implementation, the teachers had never requested discussion. Certainly, notice was a key consideration in the court’s holding. However, a more practical consideration might have been that the Union Elementary School teachers had worked a regular school day for which they had contracted. A contrary decision could have ultimately resulted in teachers being paid twice for the same day’s work whenever a school employer had to close a portion of the school district for emergency reasons.

The question of whether the IEERB had jurisdiction over the Joint Union School Board of Education in *Union County* was considered by both the Indiana Court of Appeals²¹ and United States District Court for the Southern District of Ohio.²² The Indiana court found that both the Union County School Corporation and the Joint Union School Board were employers within the CEEBA.²³ In arriving at this determination, the Indiana court recognized that section 11 of the CEEBA provided the basis for the IEERB’s jurisdiction over complaints of unfair practices²⁴ and concluded that the jurisdiction of the IEERB concerned disputes between school employers and school employees. Section 2(c) of the CEEBA defines a school employer as “the governing body of each school

¹⁸471 N.E.2d at 1199.

¹⁹*Id.* at 1200.

²⁰*Id.* at 1199.

²¹*Id.* at 1195-96.

²²*College Corner Local School Dist. v. Union County School Corp.*, No. 81-2994 (S.D. Ohio May 31, 1985).

²³471 N.E.2d at 1195.

²⁴IND. CODE § 20-7.5-1-11 (1982) provides:

(a) Any school employer or any school employee who believes he is aggrieved by an unfair practice may file a complaint

corporation and any person or persons authorized to act for the governing body of the school employer in dealing with its employees.”²⁵

Both the Union County School Corporation in Indiana and the College Corner Local School District in Ohio had jointly formed Union Elementary School. Those two entities organized and established the Joint Union School Board to operate Union Elementary School. Particularly significant is the Indiana court’s finding that the Joint Union School Board fell within the statutory definition of “school employer.” The court concluded that the Board was given its authority by the local school corporations in Indiana and Ohio. As such, it was a “person or persons authorized to act for the school employer in dealing with employees.”²⁶

At the same time that both school employers were seeking judicial review in Indiana, the College Corner Local School District filed an amended supplemental complaint in the United States District Court for the Southern District of Ohio joining the IEERB as a party defendant. The plaintiff prayed for relief against the IEERB in the form of a preliminary and permanent injunction, restraining the IEERB from purporting to exercise jurisdiction over the Joint Union School Board of Education and the College Corner School, *i.e.*, Union Elementary School, and from proceeding with the unfair practice complaints, which were then pending before the IEERB, involving the College Corner Board.

From the outset, the IEERB had contested subject matter jurisdiction, as well as all other grounds upon which it had been joined as a party defendant. Upon the motion of the district court, the parties to the litigation were asked to submit briefs on application of the eleventh amendment.²⁷ Later, the district court agreed with the IEERB and held that the litigation was barred by the eleventh amendment,²⁸ recommending that the amended supplemental complaint be dismissed with prejudice as to the IEERB. The district court noted that although the state of Indiana was not a named defendant, federal courts usually hold that the eleventh amendment

²⁵ *Id.* § 20-7.5-1-2(c) (1982).

²⁶ 471 N.E.2d at 1196 (quoting IND. CODE § 20-7.5-1-2(c) (1982)). See *supra* note 25 and accompanying text.

²⁷ The eleventh amendment to the United States Constitution provides that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.”

²⁸ *College Corner Local School Dist. v. Union County School Corp.*, No. 81-2994 (S.D. Ohio May 31, 1985). The District Court rejected the *Ex parte Young*, 209 U.S. 123 (1908), exception to the eleventh amendment bar. The plaintiff had not alleged that any IEERB individuals had acted in an unconstitutional manner. Under the recent holding in *Pennhurst State School and Hosp. v. Halderman*, 104 S. Ct. 900 (1984), the plaintiff must allege a violation of the United States Constitution because *Ex parte Young* does not apply to violation of state constitutions.

bars suit against a state agency which is the alter ego of the state.²⁹ The key element in determining the question of alter ego is the degree of autonomy that the state entity has. The court found that the IEERB was not at all independent of the state of Indiana and that the IEERB was created, operated, and treated as a state agency, meaning that the IEERB is nothing more than an arm of the state.

The district court also pointed out that "[w]hile the Eleventh Amendment on its face only bars suits by citizens of one State against another State, the Supreme Court has long held that the Amendment also bars suits of a citizen against his own state."³⁰ The court therefore concluded that the IEERB was also immune from the cross-claim of the defendant Union County School Corporation (of Indiana) and the party defendant Joint Union School Board (of both Indiana and Ohio).

²⁹Judgment in the original complaint, *College Corner Local School District v. Union County School Corp.*, No. 2994 (S.D. Ohio), had been filed on November 3, 1984. In the original complaint, subject matter jurisdiction was apparently grounded on diversity of citizenship although the question of subject matter jurisdiction was not litigated at that time. Moreover, the IEERB was not a party to the original litigation. The IEERB was joined as a new party defendant when the supplemental amended complaint was filed in 1981.

³⁰According to *Pennhurst State School and Hosp. v. Halderman*, 104 S. Ct. 900, 908, if the IEERB could be classified as an alter ego of the state of Indiana, suit against it would be proscribed by the eleventh amendment and the jurisdictional bar would apply regardless of the nature of the relief sought. Therefore, requesting injunctive relief would not exempt the lawsuit from the prohibitions of the eleventh amendment.

Recent NLRB Developments

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I. INTRODUCTION

During the past year,¹ the National Labor Relations Board ("Board" or "NLRB") has issued a number of decisions that represent marked changes in Board interpretation of the National Labor Relations Act.² Because members of the NLRB are appointed by the President of the United States,³ and because the NLRB's interpretations of the Act are to be upheld by reviewing courts so long as they are reasonable,⁴ the potential is great for a given Board to have a substantial impact on labor law. The current Board, led particularly by Chairman Donald Dotson, whom President Reagan appointed in 1984, has effected a number of significant changes. These changes have been heralded by some⁵ and lamented by others,⁶ but are of undeniable importance to all who advise employers, unions, or employees of their rights under the National Labor Relations Act.

This Article will survey those Board decisions from the past year that mark significant departures from prior Board policy. Also included will be discussion of pertinent United States Supreme Court and Seventh Circuit Court of Appeals⁷ decisions.

II. CONCERTED ACTIVITY

Section seven of the NLRA provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

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¹The Survey period extends from June, 1984 through May, 1985.

²29 U.S.C. §§ 141-187 (1982).

³29 U.S.C. § 153 (1982). For an empirical study of the ramifications of political appointments to the Board, see Cooke and Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982).

⁴See, e.g., *Pattern Makers' League v. NLRB*, 105 S. Ct. 3064, 3075 (1985).

⁵See, e.g., Coupe & Murphy, *NLRB Strike Rulings Likely to Weaken Union's Power*, L.A. Daily J., Aug. 20, 1984, at 4, col. 3.

⁶See, e.g., Simon, *Has There Been a Shift In the NLRB's Policy?*, 5 NAT'L L.J. 17, at 5, col. 1 (Jan. 3, 1983).

⁷It should be noted, of course, that given the "race to the circuits" phenomenon, decisions from other circuits may be of major significance as well.

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .⁸

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights guaranteed under section seven.⁹ One of the recurring problems confronting the NLRB has been the determination of what constitutes "concerted activities" under section seven, and what therefore enjoys the protection of section 8(a)(1).

A. Meyers Industries

On January 6, 1984, the Board rendered a definition of "concerted activities" that has had a far-reaching impact on subsequent Board decisions. In *Meyers Industries*,¹⁰ the Board adopted a restrictive view of concerted activity and, in so doing, overruled *Alleluia Cushion*¹¹ and its nine years of progeny.¹² The employer in *Meyers* had discharged an employee because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to state safety authorities. Rather than follow the *Alleluia* presumption that safety concerns are necessarily of interest to and shared by all others within a particular work force, so that even individual action in furtherance of such objectives must be considered concerted, the *Meyers* Board purported to resurrect a prior standard of concerted activity. The essence of this standard lay in "employee interaction in support of a common goal."¹³ This objective notion of employee "interaction," as subsumed in the new test enunciated in *Meyers*, does not consider an activity concerted unless it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."¹⁴

Significantly, the Court of Appeals for the District of Columbia denied enforcement of the Board's order in *Meyers*,¹⁵ finding that the Board had "misconstrued the bounds of the law" by interpreting concerted activity

⁸29 U.S.C. § 157 (1982).

⁹*Id.* § 158(a)(1).

¹⁰268 N.L.R.B. 493 (1984), *enforcement denied sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 54 U.S.L.W. 3310 (U.S. Nov. 4, 1985) (No. 85-463). Although *Meyers Industries* is technically outside the Survey period, a discussion of that decision is essential for understanding subsequent developments.

¹¹*Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

¹²*See, e.g.,* Pink Moody, Inc., 237 N.L.R.B. 39 (1978).

¹³268 N.L.R.B. at 494 (citing *Traylor-Pamco*, 154 N.L.R.B. 380 (1965)).

¹⁴268 N.L.R.B. at 497.

¹⁵*Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

so restrictively.¹⁶ Despite the circuit court's denial of enforcement, the NLRB has continued to employ the test it set out in *Meyers*. Several recent Board decisions therefore reflect the significance of *Meyers* and the intention of a majority of the current Board to view "concerted activities" narrowly.

B. ABF Freight Systems

In *ABF Freight Systems*,¹⁷ the Board applied *Meyers* and found that a truck driver who was fired when he refused to operate what he considered an unsafe vehicle had not engaged in concerted activity. While this factual setting closely resembled that of *Meyers*, it differed in one important respect: the ABF employee was covered by a collective bargaining agreement, which provided that no employee could be required to operate an unsafe truck.¹⁸

It has long been held by the Board, under the *Interboro*¹⁹ doctrine, that the reasonable and honest attempt of a single individual to enforce the terms of a collective bargaining agreement constitutes concerted activity.²⁰ That doctrine was recently upheld by the Supreme Court in *City Disposal Systems*.²¹

In *Freight Systems*, the Board utilized a novel, two-tiered approach in resolving the question whether concerted activity was present. The Board first applied the *Meyers* test to the conduct at issue: "Accordingly, applying *Meyers*, we find that Callahan's refusal to drive did not constitute actual concerted activity."²² Then, and only then, did the Board turn to *Interboro*. Finding the driver's refusal "petty" and "unfounded,"²³ rather than "reasonable" and "honest,"²⁴ the Board concluded "that under the *Interboro* doctrine, as affirmed by the Supreme Court in *City Disposal*, Callahan's refusal to drive based on those complaints was neither concerted nor protected activity within the meaning of Section 7 of the Act."²⁵

Had the Board approached the facts of *Freight Systems* strictly from the *Interboro* perspective, the case would not have marked a significant development, for the facts fall easily within an *Interboro* mode of analysis. But the preliminary application of *Meyers* to the case obscures even the clear line of distinction the Supreme Court seemed to envision between

¹⁶*Id.* at 942.

¹⁷271 N.L.R.B. 35 (1984).

¹⁸*Id.*

¹⁹*Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, *enf'd*, 388 F.2d 495 (2d Cir. 1967).

²⁰*Id.* at 1298.

²¹NLRB v. *City Disposal Systems, Inc.*, 104 S. Ct. 1505 (1984).

²²271 N.L.R.B. at 35.

²³*Id.* at 36-37.

²⁴*Interboro*, 157 N.L.R.B. at 1298.

²⁵271 N.L.R.B. at 37.

Meyers and *Interboro*, the existence of a collective bargaining agreement. The Court noted in *City Disposal*: "[W]here a group of employees are *not unionized* and there is *no collective-bargaining agreement*, an employee's assertion of a right that can only be presumed to be of interest to other employees is not concerted activity. . . . The *Meyers* case is thus of no relevance here."²⁶

While the long-range significance of *Freight Systems* is impossible to predict, the case does suggest that the present Board will make liberal use of *Meyers* in resolving questions of concerted activity. This approach may act to narrow the scope of *Interboro*. Indeed, had application of the *Meyers* test in *Freight Systems* indicated concerted activity, the Board, presumably, would not even have needed to refer to *Interboro*.

C. Jefferson Electric Company

Even in the context of very serious health and safety complaints, the Board has strictly applied *Meyers* to require group action for concerted activity. For example, in *Jefferson Electric Company*,²⁷ a group of workers was exposed to noxious fumes caused by a clogged air vent. Several employees complained to management, but the company did not correct the problem. The following day, eleven employees had to be sent to the company doctor; three required hospitalization. The employee most severely ill filed a state OSHA complaint. She was later discharged for filing the complaint.²⁸ The Board held her action unconcerted under *Meyers* because it found no evidence that she had solicited the support of other employees before filing her complaint.²⁹

Jefferson Electric also plainly illustrates another change *Meyers* has wrought. Under *Alleluia Cushion*, the decision overruled by *Meyers*, the Board had taken the position that

where an employee speaks up and seeks to enforce a statutory provision relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.³⁰

This presumption of mutual concern was expressly rejected in *Meyers*. The burden of proof is now on the General Counsel to demonstrate support by other employees for the particular action at issue. As tacitly mandated by *Meyers*, this burden will not easily be met: "Taken by

²⁶104 S. Ct. at 1510 n.6 (emphasis added).

²⁷271 N.L.R.B. 1089 (1984).

²⁸*Id.*

²⁹*Id.*

³⁰221 N.L.R.B. at 1000.

itself . . . *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."³¹

D. Mannington Mills

In *Mannington Mills*,³² the Board tightened the *Meyers* harness even further. There, it was held that an employee's threat that he and others on his shift would refuse to do work left by an earlier shift was an individual action and not concerted activity.³³

Frie, the employee, was a crew leader on the night shift and was the employee representative elected by his department to the company's safety committee. This committee had a history of raising general issues of employee concern as well as safety problems. Others in Frie's department had a longstanding complaint about the company's requiring night shift employees to do work left uncompleted by the first shift. Frie, acting in his capacity as employee representative, informed the committee of this complaint in July of 1980. In October of the same year, Frie again complained about the extra work to the company foreman and stated that the night crew was not going to do that work in the future. At that point, Frie also shouted to a fellow employee, "[I]sn't that right, Wayne." The reply was not heard.³⁴ Frie also testified that several other employees had indicated to him that they were going to refuse to do the work, but none of those employees testified at the hearing. Other employees did testify, however, that they had complained to Frie and the employer about the extra work assignments.³⁵

Following the October incident, the company discharged Frie, contending that he had been discharged for horseplay. An administrative law judge concluded that the company's stated reason for the termination was pretextual and that Frie had actually been discharged because of his earlier complaints about work assignments. The Board found it unnecessary to ascertain the employer's true motivation, however, concluding that Frie had not engaged in concerted activity when he threatened to refuse to accept certain work assignments.³⁶

Member Zimmerman registered a strong dissent, maintaining that Frie's October action was a continuation of his earlier complaint to the committee and had been made in his representative capacity.³⁷ He also

³¹268 N.L.R.B. at 498 (emphasis in original).

³²272 N.L.R.B. 176 (1984).

³³*Id.* at 177.

³⁴*Id.* at 176.

³⁵*Id.*

³⁶*Id.* at 176 n.1.

³⁷*Id.* at 177 (Zimmerman, Member, dissenting).

noted that the record clearly evidenced the employer's knowledge of the concerted nature of Frie's conduct. Zimmerman would have concluded that the company's horseplay contention was merely a pretext for unlawful discrimination.³⁸

Both *Jefferson Electric* and *Mannington Mills* suggest that the current Board will require strong evidence of other employee support before finding an individual's action concerted. That support will have to be current, unequivocal, and specifically related to the conduct at issue. Any doubts about whether the employee's actions are based on the authority given him by others to act on their behalves may well be resolved against a finding of concerted activity. As demonstrated by the facts of these two cases, this approach may, in some instances, tend to overlook the realities of the workplace. For seldom, in the absence of a union, will one employee give another clear and direct authority to take a particular action at a particular time on the former's behalf.

E. Collins Refractories

In 1978, the NLRB held in *Self-Cycle & Marine Distributor Co.*³⁹ that an employee filing an unemployment compensation claim was engaged in a concerted activity and that the employer's failure to recall an employee for doing so violates section 8(a)(1). This position was based on the reasoning that such claims arise out of the employment relationship, are one aspect of national labor policy, and are matters of common interest to other employees.⁴⁰

With its decision in *Collins Refractories*,⁴¹ however, the Board has now taken the position that *Self-Cycle* is incompatible with the standard for concerted activity enunciated in *Meyers*: "Clearly, the filing for benefits is an individual act undertaken by the individual solely on his own behalf and for his own benefit rather than for the mutual aid and benefit of other employees. . . ."⁴²

Significant in *Collins Refractories* is that the Board was not simply considering an isolated incident of company refusal to recall one employee (Addis) who had filed an unemployment claim, but was also considering a general company policy prohibiting the filing of unemployment compensation claims.⁴³ This distinction was noted in a dissent by Member Zimmerman, who maintained that determination of the legality of the company's general rule was not controlled by *Meyers*.⁴⁴ He said,

³⁸*Id.* at 178.

³⁹237 N.L.R.B. 75 (1978).

⁴⁰*Id.* at 75-76.

⁴¹272 N.L.R.B. 931 (1984).

⁴²*Id.* at 932 n.2.

⁴³*Id.* at 931.

⁴⁴*Id.* at 933 (Zimmerman, Member, dissenting).

Under the majority view in *Meyers Industries*, Addis' filing of the unemployment claim is not a form of concerted activity and the Respondent's action toward Addis, standing alone, is perfectly lawful. However, the Respondent's refusal to recall Addis does not stand alone. It occurs against the background of a general rule proscribing unemployment claims. In this context, the refusal to recall may interfere with the exercise of protected rights, even though Addis, himself, was not engaged in protected activity.⁴⁵

In support of this proposition, Zimmerman relied on *City Disposal* reasoning.⁴⁶ There, the Court explained, in the context of an individual's attempt to enforce a right grounded in a collective bargaining agreement, that even though the individual's action may not be concerted, his action may be protected if permitting the employer to discipline him would chill the legitimate exercise of concerted activity by other employees.⁴⁷ The majority's summary rejection of Zimmerman's argument suggests the present Board's inclination to apply not only the holding, but also the rationale, of *City Disposal* narrowly, in favor of a broad application of *Meyers Industries*:

That case [*City Disposal*] is inapposite to the instant case which does not involve the invocation of a right rooted in a collective-bargaining agreement. Our finding that the Respondent's policy does not affect, let alone restrain, any concerted activity is based on the clear meaning of the statutory language and is squarely within *Meyers Industries*.⁴⁸

F. A Word of Caution

Any conclusions based on *Meyers Industries* regarding whether various employee actions may be deemed "concerted" should be reached with a degree of caution. Not only did the D.C. Circuit deny (with strong language) enforcement of the Board's order in *Meyers*,⁴⁹ but also every other circuit court ruling on *Meyers*-related Board orders to date has been reluctant to adopt the *Meyers* test expressly.⁵⁰ Furthermore, the Supreme

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷104 S. Ct. at 1505 n.10.

⁴⁸272 N.L.R.B. at 932 n.2.

⁴⁹755 F.2d 941 (D.C. Cir. 1985).

⁵⁰See *JMC Transport, Inc. v. NLRB*, Nos. 84-8960 and 84-6060 (6th Cir. Nov. 12, 1985) (available on LEXIS, Genfed library, Usapp file) (court found activity concerted even under *Meyers* test and declined to rule on whether *Meyers* was an appropriate interpretation of section seven); *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985) (court declined to review *Meyers*, relying more on *City Disposal's* more "liberal view of concerted activity," but

Court's reference to *Meyers in City Disposal*⁵¹ suggests that the Court may limit the scope of *Meyers* if faced with the issue.⁵²

III. THE RIGHT TO STRIKE (AND NOT TO STRIKE)

A. Sympathy Strikes

In *Butterworth-Manning-Ashmore Mortuary*,⁵³ the Board considered a collective bargaining agreement provision stipulating:

It shall not be a violation of this agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line at the place of business of any employer party to this Agreement.⁵⁴

The mortuary's employees were divided into two bargaining units: the embalmers and the clerical workers. When the embalmers went on strike, several clerical workers refused to cross the embalmers' picket line. The employer then permanently replaced one of the clerical workers and put her name on a preferential hiring list.⁵⁵

From these facts, the Board determined that the language contained in the collective bargaining agreement did not constitute a waiver of the employer's right to replace permanently a sympathy striker.⁵⁶ In so holding, the Board overruled in part *Torrington Construction Co.*,⁵⁷ which had held that an almost identical provision in a collective bargaining agreement did constitute a waiver of the right to discharge a sympathy striker under similar circumstances.⁵⁸

The Board also distinguished *Butterworth* from *Torrington* on the basis of the difference between discharging an employee and permanently replacing him.⁵⁹ In *Butterworth*, the Board recognized that sympathy strikes are protected activity, but likened them to economic strikes, thereby permitting the employer to replace the sympathy striker permanently.⁶⁰ The

indicated it was in accord with the D.C. Circuit's reasoning in the denial of enforcement of *Meyers*); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295 (5th Cir. 1984) (court relied on other precedent to find absence of concerted activity and did not find it necessary to determine if *Meyers* test should be applied).

⁵¹104 S. Ct. at 1510 n.6.

⁵²See *supra* text accompanying notes 25-26.

⁵³270 N.L.R.B. 1014 (1984).

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.* at 1015.

⁵⁷235 N.L.R.B. 1540 (1978).

⁵⁸*Id.* at 1541.

⁵⁹270 N.L.R.B. at 1015.

⁶⁰*Id.* at 1014.

Board held that the contractual language at issue did not constitute the required clear and unmistakable waiver of the right to replace permanently.⁶¹

That portion of *Torrington* providing sympathy strikers protection under the Act clearly survives *Butterworth*. In *Business Services*,⁶² decided after *Butterworth*, the Board relied on *Torrington* to affirm an employee's right to honor "stranger" picket lines.⁶³ *Business Services* involved Manpower temporary employees who had been sent to work for two days for one of Manpower's customers. When the Manpower employees refused to cross the picket at the facility, Manpower discharged them. The Board, with Chairman Dotson dissenting, held that the employer had violated the Act because the sympathy strikers had engaged in concerted activity. The Board reasoned that honoring pickets was a "longstanding tactic of the American trade union movement, rooted in cardinal union principles."⁶⁴ The majority strongly rejected Chairman Dotson's contention that Manpower's "business considerations" outweighed the employees' section seven rights and found it immaterial whether the employees were familiar with the issues involved in the dispute or were merely exercising a general refusal to cross picket lines.⁶⁵

In *Indianapolis Power & Light Co.*,⁶⁶ the Board narrowed the language needed in a collective bargaining agreement to constitute union waiver of the right to engage in sympathy strikes. There, the union had agreed not to "take part in any strike."⁶⁷ The Board held that the employer had the right to rely on this language in suspending and threatening with discharge an employee who refused to cross a stranger picket line. The Board explained that a broad no-strike clause will now be interpreted as a prohibition against sympathy strikes, as well as primary strikes, unless there is extrinsic evidence or the contract demonstrates that the parties intended to exempt sympathy strikes from the general proscription.⁶⁸ The Board thereby overruled *United States Steel Corp.*⁶⁹ and *W-I Canteen Service*⁷⁰ to the extent inconsistent with its holding in *Indianapolis Power & Light*. The former decisions required the no-strike provision to men-

⁶¹*Id.* at 1015.

⁶²272 N.L.R.B. 827 (1984).

⁶³"Stranger" picket lines are picket lines established at facilities other than that of the employee's own employer and which were not established as the result of a dispute with the primary employer.

⁶⁴272 N.L.R.B. at 828.

⁶⁵*Id.*

⁶⁶273 N.L.R.B. No. 211 (Jan. 31, 1985), 118 L.R.R.M. (BNA) 1201 (1985).

⁶⁷*Id.* slip op. at 2, 118 L.R.R.M. at 1201.

⁶⁸*Id.* slip op. at 2, 118 L.R.R.M. at 1202.

⁶⁹264 N.L.R.B. 76 (1982), *enforcement denied*, 711 F.2d 772 (7th Cir. 1983).

⁷⁰238 N.L.R.B. 609 (1978), *enforcement denied*, 606 F.2d 738 (7th Cir. 1979).

tion sympathy strikes specifically before that activity could be included in the prohibition.⁷¹

B. *The Right To Resign During a Strike*

In June of 1985, the United States Supreme Court considered the other side of the strike coin—the right of an employee not to strike. Specifically at issue in *Pattern Makers' League of North America v. NLRB*⁷² was a provision in a union constitution prohibiting members from resigning from the union during a strike or when a strike was imminent.⁷³ The union fined ten members who resigned from the union in violation of the provision and returned to work. The Board ruled that the union's action was a violation of section 8(b)(1)(A) of the National Labor Relations Act.⁷⁴ The Seventh Circuit affirmed,⁷⁵ and the Supreme Court granted certiorari⁷⁶ to resolve the conflict thus created between the Seventh and the Ninth Circuits. The latter court had earlier held that unions may impose restrictions on their members' right to resign.⁷⁷

Despite the Court's 1967 holding in *NLRB v. Allis-Chalmers*⁷⁸ that section 8(b)(1)(A) does not prohibit labor unions from fining present members, the Court concluded in *Pattern Makers'* that the Board had reasonably construed this section of the Act to prohibit a union from fining members who have tendered resignations invalid under the union's constitution. Limiting *Allis-Chalmers* to a recognition that Congress never intended section 8(b)(1)(A) to interfere with the internal affairs or organization of unions,⁷⁹ the Court agreed with the Board's view that an interference with the right to resign extends to external enforcement of union rules.⁸⁰ This extension, reasoned the Court, could not be countenanced by section seven of the Act, which grants employees the right to refrain from any or all concerted activities.⁸¹ By limiting a union member's right to resign, the Court concluded, the union has impinged upon these section 7 rights, as prohibited by section 8(b)(1)(A).⁸² Stated differently, restricting a union member's right to resign "impairs the policy of voluntary unionism."⁸³

⁷¹273 N.L.R.B. No. 211, slip op. at 2-3, 118 L.R.R.M. at 1202.

⁷²105 S. Ct. 3064 (1985).

⁷³*Id.* at 3066.

⁷⁴*Pattern Makers' League of North America*, 265 N.L.R.B. 1332 (1982).

⁷⁵*Pattern Makers' League of North America v. NLRB*, 724 F.2d 57 (7th Cir. 1983).

⁷⁶*Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 79 (1984).

⁷⁷*Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984).

⁷⁸388 U.S. 175 (1967).

⁷⁹105 S. Ct. at 3069.

⁸⁰*Id.*

⁸¹29 U.S.C. § 157 (1982).

⁸²*Id.* § 158(b)(1)(A).

⁸³105 S. Ct. at 3071.

IV. *Weingarten* RIGHT

In *NLRB v. J. Weingarten*,⁸⁴ the Supreme Court ruled that an employee is entitled to representation at an interview that he reasonably believes will result in disciplinary action against him.⁸⁵ Three NLRB decisions rendered during the survey period have limited the right and remedy afforded by *Weingarten*.

A. Prudential Insurance

One limitation placed on the *Weingarten* right was the Board's determination that the protection can be waived by a collective bargaining agreement. In *Prudential Insurance*,⁸⁶ the union had argued that the right is a fundamental individual employee concern not subject to waiver by a union.⁸⁷ The Board, however, relied on the Supreme Court's decision in *Metropolitan Edison*,⁸⁸ that a union can waive an employee's statutory rights, to find that the *Weingarten* right, like the right to strike, is subject to being waived by the union.⁸⁹ The Board went on to conclude, contrary to its initial decision in the case, that the contract provision in question constituted a clear and unmistakable waiver of the right.⁹⁰ The contract clause provided in pertinent part:

The Union further agrees that neither the Union nor its members shall interfere with the right of the Employer:

. . . .

(b) To interview any Agent with respect to any place of his work without the grievance committee being present.⁹¹

B. Sears, Roebuck & Co.

The Board also decided in 1985 that the *Weingarten* right applies only to unionized employees—that employees not represented by a union have no right to the presence of a fellow employee at a disciplinary interview. *Sears, Roebuck & Co.*⁹² therefore reversed the position the Board had taken in 1982 in *Materials Research Corp.*,⁹³ that the *Weingarten* right extends to unrepresented employees.

⁸⁴420 U.S. 251 (1975).

⁸⁵*Id.* at 262.

⁸⁶275 N.L.R.B. No. 30 (April 25, 1985), 119 L.R.R.M. (BNA) 1073 (1985).

⁸⁷*Id.*

⁸⁸460 U.S. 693 (1983).

⁸⁹275 N.L.R.B. No. 30, slip op. at 2, 119 L.R.R.M. at 1073.

⁹⁰*Id.*

⁹¹*Id.* slip op. at 3, 119 L.R.R.M. at 1074.

⁹²274 N.L.R.B. No. 55 (Feb. 22, 1985), 118 L.R.R.M. (BNA) 1329 (1985).

⁹³262 N.L.R.B. 1010 (1982).

In *Sears*, an employee requested that a fellow employee or a representative of the union conducting an organizational campaign be present at an interview. The Board determined that the employer had not violated the Act by denying the request. The Board reasoned that the *Materials Research* rule infringed on the employer's freedom to deal individually with employees, a right employers have in the absence of a union.⁹⁴

The Board rejected the argument that because the *Weingarten* right is rooted in section seven, which extends its protections to both represented and unrepresented employees, *Weingarten* should apply to unrepresented workers.⁹⁵ The Board maintained, "The scope of Section 7's protections may vary depending on whether employees are represented or unrepresented. . . ."⁹⁶ Further, the Board reasoned that placing a *Weingarten* representative in a nonunion setting would be contrary to the Act's exclusivity principle; it would require the employer to recognize and deal with the equivalent of a union representative.⁹⁷

C. Taracorp Industries

In addition to narrowing the class of employees entitled to *Weingarten* protection, the Board recently limited the remedy for an employer's violation of the right. In the Board's original decision in *Taracorp Industries*⁹⁸ in July of 1981, it concluded that the employer had violated the employee's *Weingarten* right and issued a cease and desist and make-whole order (reinstatement and back pay). However, before its action could be reviewed by the court of appeals, the Board reconsidered its decision and order.⁹⁹

Upon reconsideration in 1984, the Board did not disturb its conclusion that the employer had violated the Act by denying the employee's request for union representation at a disciplinary interview. However, the Board determined that a make-whole remedy in this situation was inappropriate,¹⁰⁰ thereby overruling *Kraft Foods*¹⁰¹ and its progeny.¹⁰²

Taracorp Industries involved an employee who refused to perform a task as directed by the plant foreman. The foreman immediately informed the employee that he was suspended and should report to the plant manager's office. While the employee was en route to the manager's office, the foreman telephoned the manager and described the incident. The manager replied, "[I]f [the employee] refuses to do the job, that's

⁹⁴274 N.L.R.B. No. 55, slip op. at 2, 118 L.R.R.M. at 1330.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.* slip op. at 5, 118 L.R.R.M. at 1331.

⁹⁸257 N.L.R.B. 463 (1981).

⁹⁹273 N.L.R.B. No. 54 (Dec. 12, 1984), 117 L.R.R.M. (BNA) 1497 (1984).

¹⁰⁰*Id.* slip op. at 4, 117 L.R.R.M. at 1498.

¹⁰¹251 N.L.R.B. 598 (1980).

¹⁰²*See, e.g.,* Illinois Bell Telephone Co., 251 N.L.R.B. 932 (1980).

termination.” Upon reaching the manager’s office, the employee requested representation, which the manager refused. At the end of the interview, the employee was terminated.¹⁰³

Neither the administrative law judge nor the Board (at either stage) found that the employee had been discharged for asserting his *Weingarten* right; rather, they agreed that he had been fired for insubordination.¹⁰⁴ In this situation—where termination is for just cause and not for assertion of the right—the Board has now taken the position that it is without authority to order reinstatement and back pay.¹⁰⁵

In support of this conclusion, the Board cited the Supreme Court’s statement in *Fibreboard Corp.*¹⁰⁶ that the legislative history of section 10(c) of the Act indicates that it was designed to preclude the Board from reinstating an individual who has been discharged because of misconduct.¹⁰⁷ The Board also noted that the courts of appeals have repeatedly denied enforcement of make-whole orders in this context.¹⁰⁸ Finally, the Board criticized what it termed “the expansionist approach to *Weingarten*.”¹⁰⁹

Consequently, when termination is found to be for just cause, the Board will not order reinstatement and back pay, even though the employer has violated the employee’s right to representation at the interview. A make-whole remedy will be appropriate only if the employee was discharged or disciplined for asserting the right to representation.¹¹⁰

V. DUTY TO BARGAIN

A. Access to Employer’s Property

Section 8(a)(5) of the National Labor Relations Act imposes on the employer the duty to bargain regarding the terms and conditions of employment.¹¹¹ This duty to bargain also includes the duty to make certain information available to the union during the bargaining process.¹¹²

In *Holyoke Water Power Co.*,¹¹³ a union requested access to the employer’s property to survey potential health and safety hazards. Specifically, the union asked that the company permit the union’s industrial hygienist to inspect the noise level of a forced draft fan room used in

¹⁰³273 N.L.R.B. No. 54, slip op. at 3, 117 L.R.R.M. at 1497.

¹⁰⁴*Id.* slip op. at 3-4, 117 L.R.R.M. at 1498.

¹⁰⁵*Id.* slip op. at 9, 117 L.R.R.M. at 1500.

¹⁰⁶*Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

¹⁰⁷*Id.* at 217.

¹⁰⁸273 N.L.R.B. No. 54, slip op. at 6 n.11, 117 L.R.R.M. at 1499 n.11 (citing cases).

¹⁰⁹*Id.* slip op. at 8-9, 117 L.R.R.M. at 1499-1500.

¹¹⁰*Id.* slip op. at 7 n.12, 117 L.R.R.M. at 1499 n.12.

¹¹¹29 U.S.C. § 158(a)(5) (1982).

¹¹²*See, e.g., NLRB v. Realty Maintenance, Inc.*, 723 F.2d 746 (9th Cir. 1984); *General Motors Co., Inc. v. NLRB*, 700 F.2d 1083 (6th Cir. 1983).

¹¹³273 N.L.R.B. No. 168 (Jan. 11, 1985), 118 L.R.R.M. (BNA) 1179 (1985).

the combustion process. The administrative law judge had ruled that, under section 8(a)(5), the company had an obligation to provide the access requested.¹¹⁴ The judge, in reaching this conclusion, reasoned that the company had an obligation to provide information relevant and necessary to the union's performance of its representative duty, that the company had a duty to bargain regarding health and safety, and, most significantly, that a request for *access* to check for health and safety violations is the legal equivalent of a request for *information*. He relied on *Winona Industries*¹¹⁵ to support his final proposition.

The Board, however, overruled *Winona Industries* in this regard and determined that a request for access could not be equated with a request for information.¹¹⁶ (The company had offered the union test results rather than access, but the administrative law judge had ruled the test results inadequate.) Instead, the Board now takes the position that an employer's right to control its property is a factor that must be weighed against the employee's right to proper representation in determining whether an outside union representative should be afforded access to the employer's property.¹¹⁷

In applying this balancing test to the facts in *Holyoke*, the Board found that the company's property interest was outweighed by employee concerns.¹¹⁸ But in ordering the company to permit the union hygienist to enter its fan room to test for noise hazards, the Board, unlike the ALJ, limited access to a reasonable period sufficient for the union to fulfill its representation duties without undue interruption of the company's operations. The Board explained: "This limitation is in line with our resolve to accommodate the conflicting rights with as little destruction of one as is consistent with the maintenance of the other."¹¹⁹

B. Bargaining Orders

In 1969, when it decided *NLRB v. Gissel Packing Co.*,¹²⁰ the Supreme Court set out the guidelines for determining when issuance of a bargaining order would be a proper exercise of the Board's remedial power under section 10(c) of the Act.¹²¹ In what has become known as *Gissel* category one, the Court, in dictum, left open the possibility of imposing a bargaining order without inquiry into the majority status of the union in "excep-

¹¹⁴*Id.* slip op. at 2-3, 118 L.R.R.M. at 1180.

¹¹⁵257 N.L.R.B. 695 (1981).

¹¹⁶273 N.L.R.B. No. 168, slip op. at 4, 118 L.R.R.M. at 1180.

¹¹⁷*Id.*

¹¹⁸*Id.* slip op. at 5-6, 118 L.R.R.M. at 1180-81.

¹¹⁹*Id.* slip op. at 6, 118 L.R.R.M. at 1181.

¹²⁰395 U.S. 575 (1969).

¹²¹*Id.* at 613-15.

tional" cases marked by "outrageous" and "pervasive" unfair labor practices.¹²²

Following *Gissel*, the Board and the courts of appeals have struggled with the question of when, if ever, the Board has the power to issue a bargaining order when the union has never demonstrated majority status. The Court of Appeals for the District of Columbia presented the dilemma in the following terms:

[I]f the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant unfair labor practices, employees may be saddled for a prolonged period with a union not enjoying majority support.¹²³

In *Gourmet Foods, Inc.*,¹²⁴ the Board had occasion to reexamine the problem and, this time, resolved the question in favor of majority rule principles. After a thorough review of the Act, legislative history, court precedent, and legal commentary, the Board concluded that it had no authority to issue a nonmajority bargaining order.¹²⁵ In so ruling, the Board expressly overruled previous cases in which it had considered itself authorized to issue nonmajority bargaining orders and in which it had exercised that authority.¹²⁶

C. Successor Employer's Duty To Bargain

With *Harley-Davidson Transportation Co.*,¹²⁷ the Board has eased the burden imposed on successor employers to bargain with unions that may no longer enjoy majority status. In this case, the union had had a three-year collective bargaining agreement with the prior employer that expired on March 31, 1982. On April 1, 1982, the successor, Harley-Davidson, assumed control of the operation. A majority of the employees hired by Harley-Davidson had been employed by the prior employer, and these employees continued to comprise a majority of the bargaining unit at issue. On July 6, 1982, the union requested bargaining, and Harley-Davidson, recognizing that it might be a successor, agreed to bargain. After meeting three times, Harley-Davidson withdrew from bargaining after being

¹²²*Id.* at 613-14.

¹²³*Conair Corp. v. NLRB*, 721 F.2d 1355, 1378 (D.C. Cir. 1983).

¹²⁴270 N.L.R.B. 578 (1984).

¹²⁵*Id.* at 583.

¹²⁶*Id.* (citing *Conair Corp.*, 261 N.L.R.B. 1189 (1982), *enf'd in part and enforcement denied in part*, 721 F.2d 1355 (D.C. Cir. 1983)).

¹²⁷273 N.L.R.B. No. 192 (Jan. 22, 1985), 118 L.R.R.M. (BNA) 1204 (1985).

presented with a petition signed by a majority of its employees stating that they no longer wanted to be represented by the union.¹²⁸

At the hearing level, the judge found that by conceding it was a successor and agreeing to negotiate, Harley-Davidson had voluntarily recognized the union and had impliedly admitted that it had no reason to doubt majority status. The judge therefore concluded that Harley-Davidson assumed the obligation to bargain for a "reasonable time" regardless of a subsequent good-faith doubt regarding majority status.¹²⁹ He relied on *Landmark International Trucks*¹³⁰ and, alternatively, on *Holiday Inn of Niles Michigan*¹³¹ to reach this conclusion.

The Board disagreed with the judge's characterization of the successor's bargaining obligation and thus did not adopt his conclusion. Rather, the Board ruled that when a successor employer recognizes a union that has been in place for one year or more, the union enjoys only a rebuttable presumption of majority status. The successor employer can withdraw from negotiation *at any time* following recognition if it can show that the union has lost its majority status or that the refusal to bargain was "grounded on a good-faith doubt based on objective factors that the union continued to command majority support."¹³² In so holding, the Board expressly overruled *Landmark*, *Holiday Inn*, and similar cases to the extent they were inconsistent with the Board's new position. The Board also determined that the employee petition, even though the employer had not authenticated the signatures, constituted a sufficient objective basis to support the employer's good faith doubt of the union's continued majority status.¹³³

VI. STATUTE OF LIMITATIONS

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."¹³⁴ In *United States Postal Service Marina Mail Processing Center*,¹³⁵ the Board adopted a new position with respect to the commencement of this six-month limitation period.

U.S. Postal Service involved an employee who received a letter on January 29, 1981, advising him that his employer intended to remove his name from its employment rolls no later than thirty days from receipt

¹²⁸*Id.* slip op. at 2, 118 L.R.R.M. at 1204.

¹²⁹*Id.* slip op. at 2-3, 118 L.R.R.M. at 1204-05.

¹³⁰257 N.L.R.B. 1375 (1981).

¹³¹241 N.L.R.B. 555 (1979).

¹³²273 N.L.R.B. No. 192, slip op. at 3, 118 L.R.R.M. at 1205.

¹³³*Id.* slip op. at 4, 118 L.R.R.M. at 1205.

¹³⁴29 U.S.C. § 160(d) (1982).

¹³⁵271 N.L.R.B. 397 (1984).

of the letter for misconduct and failure to follow instructions. Despite his denial of the allegations, the employee received another letter on February 27, 1981, informing him that the evidence supported the charges against him and that his removal would be effective March 2, 1981. It was not until the employee had exhausted his internal appeal rights unsuccessfully, however, on August 21, 1981, that his name was officially removed from the employment rolls. On January 6, 1982, he filed an unfair labor practice charge against his former employer.¹³⁶

The Board, breaking with established precedent, held that the six-month limitation period began to run on February 27, 1981, the day the employee received notice advising him of his removal, rather than on August 21, 1981, the date of his actual removal.¹³⁷ Several previous Board cases had held that the 10(b) period begins to run, not at the time the employee receives unequivocal notice of an adverse employment action, but at the time the action is actually taken.¹³⁸ The Board noted that appellate courts have not agreed with this interpretation of the statute.¹³⁹

In changing its position, the Board relied on two Supreme Court decisions,¹⁴⁰ in the Title VII¹⁴¹ and section 1983¹⁴² contexts, which hold that the pertinent statutes of limitations begin to run when communication of the adverse employment decision is made, rather than when the effect of the adverse decision is felt. In adopting the Court's rationale and applying it to unfair labor practice cases, the Board explained:

[T]he Board will henceforth focus on the date of the alleged unlawful act, rather than on the date its consequences become effective, in deciding whether the period for filing a charge under Section 10(b) has expired. Where a final adverse employment decision is made and communicated to an employee—whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination—the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.¹⁴³

¹³⁶*Id.* at 397-98.

¹³⁷*Id.* at 400.

¹³⁸See, e.g., *Roman Catholic Diocese of Brooklyn*, 222 N.L.R.B. 1052 (1976), *enforcement denied in relevant part sub nom. Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

¹³⁹271 NLRB at 398 (citing cases).

¹⁴⁰*Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII action); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (§ 1983 action).

¹⁴¹42 U.S.C. §§ 2000e-2000e-17 (1982).

¹⁴²42 U.S.C. § 1983 (1982).

¹⁴³271 N.L.R.B. at 399-400.

Discipline of Attorneys for Personal Misconduct

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I. INTRODUCTION

During this past year's Survey period, the Indiana Supreme Court again decided a large number and wide variety of attorney discipline cases.¹ Many of these cases address instances of attorney neglect, conflicts of interest and misappropriation of funds, which involve violations of the Code of Professional Responsibility obvious to most practicing lawyers.² These cases do not need elaboration and will not be addressed by this article. This Article will discuss the large number of a alcohol and substance abuse cases decided by the court and the possible changes in the court's approach that could result if the new Model Rules of Professional Conduct are adopted.³ In addition, the Article will highlight some less familiar issues of first impression decided by the court during the Survey period.

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¹1984-1985 IND. SUP. CT. DISCIPLINARY COMM'N ANN. REP. at 5, 6.

²In addition to the disbarment cases covered by this Article, the court also awarded disbarment in *In re Burge*, 474 N.E.2d 991 (Ind. 1985) (neglect, failure to account for his client's funds, deceit, misrepresentation); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984) (conversion and misuse of client's funds, misrepresentation, neglect); *In re Deloney*, 470 N.E.2d 65 (Ind. 1984) (forgery, misuse of funds); *In re Aungst*, 467 N.E.2d 698 (Ind. 1984) (failure to preserve testamentary trust, bad checks). The court ordered suspensions of varying length in *In re Budnick*, 466 N.E.2d 36 (Ind. 1984) (contempt of court); *In re Frey*, 475 N.E.2d 688 (Ind. 1985) (sharing fees with non-lawyer who recommends lawyer's services); *In re Miller*, 462 N.E.2d 76 (Ind. 1984) (neglect, failure to identify client funds, use of misleading trade name); *In re Strain*, 477 N.E.2d 85 (Ind. 1985) (misrepresentation to client concerning untimely appeal); *In re Vickery*, 468 N.E.2d 849 (Ind. 1984) (obstruction of justice); *In re Wilcox*, 467 N.E.2d 1182 (Ind. 1984) (neglect, failure to return funds); *In re Hailey*, 473 N.E.2d 616 (Ind. 1985) (neglect); *In re Lewis*, 474 N.E.2d 962 (Ind. 1985) (misrepresentation and neglect); *In re Jackson*, 474 N.E.2d 994 (Ind. 1985) (failure to perform agreed services, retention of fee).

³The Model Rules of Professional Conduct will be considered at this year's meeting of the Indiana State Bar Association's House of Delegates. See Rakestraw, *Rule 1.6, Saga of Misunderstanding, Conflicting Purposes, Juggled Priorities*, 29 RES. GESTAE 119 (Editor's Note) (1985).

II. ALCOHOL AND SUBSTANCE ABUSE

A. *Discipline for Personal Misconduct—Standards*

Of the nine attorney disbarments ordered by the Indiana Supreme Court during the Survey period, three involved alcohol or substance abuse.⁴ Several other substance abuse cases resulted in suspensions.⁵ These cases are instructive because they indicate our supreme court's approach to an issue that has received widely varied treatment in other jurisdictions⁶ and which has received different treatment by the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.⁷

Several sections of the Model Code of Professional Responsibility, adopted in Indiana on March 8, 1971, and amended through 1985,⁸ are relevant to an attorney's non-law-related conduct. Disciplinary Rule 1-102(A)(3) charges that "[a] lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude."⁹ Disciplinary Rule 1-102(A)(6) forbids an attorney to engage in any conduct that "adversely reflects on his fitness to practice law,"¹⁰ and Canon 9 instructs that a lawyer must avoid "even the appearance of professional impropriety."¹¹ These Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹² The Disciplinary Rules are supplemented by Ethical Considerations, aspirational in nature,¹³ that

⁴*In re Hayes*, 467 N.E.2d 20 (Ind. 1984); *In re McCarthy*, 466 N.E.2d 442 (Ind. 1984); *In re Ewers*, 467 N.E.2d 1184 (Ind. 1984).

⁵*In re Thomas*, 472 N.E.2d 609 (Ind. 1985); *In re Jones*, 464 N.E.2d 1281 (Ind. 1984).

⁶*See, e.g., In re Chase*, 299 Or. 391, 702 P.2d 1082 (1985) (attempted possession of cocaine is not misdemeanor involving moral turpitude; while sale and trafficking offenses constitute moral turpitude, possessory offenses do not); *Disciplinary Counsel v. Gross*, 11 Ohio St. 3d 48, 463 N.E.2d 382 (1984) (possession of marijuana and methaqualone, and driving under the influence adversely reflect on attorney's fitness to practice law and warrant indefinite suspension); *Committee on Professional Ethics and Misconduct v. Shuminsky*, 359 N.W.2d 442 (Iowa 1984) (possession of marijuana and four amphetamine tablets violates DR 1-102(A)(6) and EC 1-5 and 9-6 warranting indefinite suspension); *In re Willis*, 371 N.W.2d 794 (S.D. 1985) (respondent's testimony before grand jury on immunity that he had used cocaine on "several occasions" resulted in 180-day suspension from law practice for failing to maintain integrity of the profession and for moral turpitude).

⁷*Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (amended 1979) *with* MODEL RULES OF PROFESSIONAL CONDUCT (1983).

⁸*See* IND. CODE OF PROFESSIONAL RESPONSIBILITY Table of Contents (amended 1984).

⁹IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(3) (1984).

¹⁰*Id.*, DR 1-102(A)(6).

¹¹*Id.*, Canon 9.

¹²*Id.*, Preamble and Preliminary Statement.

¹³*Id.*

caution a lawyer to be temperate, dignified, and to promote public confidence in the legal profession.¹⁴

The specific conduct constituting moral turpitude, impropriety, or intemperance is left undefined by the Code. This lack of definition has caused the split in interpretation among jurisdictions¹⁵ reflected in the Code's own footnotes. Essentially, the split is between jurisdictions which hold that offenses or convictions which do not affect an attorney's fitness to practice his profession are not grounds for discipline and jurisdictions which hold that the power to discipline may be exercised where an attorney's misconduct outside the scope of his profession includes offenses which are contrary to "justice, honesty, modesty or good morals."¹⁶

The new ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates in August, 1983,¹⁷ omits the "moral turpitude" language of the Code's Disciplinary Rule 1-102. Rule 8.4 of the Model Rules, which most closely resembles the Model Code's Disciplinary Rule 1-102, provides:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

¹⁴*Id.*, EC 1-5, 9-1, and 9-6. These Ethical Considerations state:

EC 1-5: A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 9-1: Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-6: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect of the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

¹⁵The split among the jurisdictions is reflected in the Code's own footnotes. *Id.*, DR 1-102 nn.13, 14.

¹⁶*Id.*, n.14 (quoting *In re Wilson*, 391 S.W.2d 914, 917 (Mo. 1965)).

¹⁷ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT (BNA) ¶ 01:101 (1984).

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.¹⁸

The Comment to Rule 8.4, also adopted by the ABA,¹⁹ clearly indicates that the omission of moral turpitude language was deliberate and that Rule 8.4 is not intended to be a basis for discipline for a lawyer's acts not relevant to his practice of law.²⁰

As the following cases indicate, Indiana can be numbered among the jurisdictions interpreting the Code of Professional Responsibility as directing discipline for a lawyer's personal misconduct outside the practice of law. Within the next year, the new Model Rules of Professional Conduct will be considered by the House of Delegates of the Indiana State Bar Association and recommendations will be made regarding the

¹⁸MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983).

¹⁹*Id.*, Rule 8.4 comment.

²⁰*Id.* That comment includes the following observation:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to the fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

* * *

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust, such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization. *Id.*

Model Rules' adoption in Indiana.²¹ Should Model Rule 8.4 be adopted as written, it may markedly change the court's current approach to personal misconduct cases as reflected in the following cases decided during the Survey period.

B. Substance Abuse - Cocaine and Marijuana

In *In re Turner*,²² respondent Turner's car was stopped by a police officer. The officer searched Turner's car and found "a quantity" of marijuana. Turner was arrested and charged with possessing marijuana in violation of Indiana Code section 35-48-4-11(1).²³ Turner pleaded guilty to a Class A misdemeanor and served six days of a sixty-day sentence before being placed on probation.²⁴

After initiation of disciplinary proceedings, Turner entered into a Conditional Agreement for discipline with the Indiana Supreme Court Disciplinary Commission, which charged Turner with violations of Disciplinary Rules 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility. By way of mitigation, the parties acknowledged "that at the time of his arrest, the respondent was not using marijuana, nor was he violating any traffic law, nor was he endangering the public in any way."²⁵

Citing Canon 1 of the Code of Professional Responsibility charging attorneys with maintaining the integrity of the profession, and Ethical Consideration 1-5, the court found that Turner had been involved with an illegal substance, a crime in Indiana, and had engaged in misconduct which reflected adversely on his profession.²⁶ The court made no comment on whether it considered Turner's possession of marijuana a violation of the Disciplinary Rules as charged by the Disciplinary Commission and, therefore, did not specifically decide whether possession of marijuana

²¹See *supra* note 3.

²²463 N.E.2d 477 (Ind. 1984).

²³IND. CODE § 35-48-4-11(i) (Supp. 1985) provides:

A person who:

(1) Knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, or hashish;

(2) Knowingly or intentionally grows or cultivates marijuana; or

(3) Knowing that marijuana is growing on his premises, fails to destroy the marijuana plants;

commits possession of marijuana, hash oil, or hashish, a class A misdemeanor. However, the offense is a class D felony (i) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hash oil or hashish, or (ii) if the person has a prior conviction of an offense involving marijuana, hash oil, or hashish.

²⁴463 N.E.2d at 477-78.

²⁵*Id.* at 478.

²⁶*Id.*

constituted moral turpitude or whether such possession reflected adversely on Turner's fitness to practice law.

Indiana case law holds that violation of an Ethical Consideration alone will not support discipline.²⁷ It is unclear, therefore, from the *Turner* decision, that absent a Conditional Agreement, the court would have held marijuana possession to be a proper subject for attorney discipline.

Approximately three weeks after the *Turner* decision, the court handed down the decision of *In re Jones*.²⁸ In *Jones*, the respondent, a candidate for Morgan County Prosecutor, was arrested for driving under the influence of intoxicating liquor and for possession of marijuana and hashish. Jones pleaded guilty to driving while intoxicated and possession of marijuana and, pursuant to a plea agreement, was fined, received a suspended sentence, and was ordered to perform community service and attend a drug abuse program.²⁹ Pursuant to Indiana Code section 35-48-4-12, the marijuana possession charge was subsequently dropped.³⁰

After his disciplinary hearing on the same facts, respondent Jones petitioned the supreme court for a review of the hearing officer's recommendation for discipline, contending that his conduct was not such that it adversely reflected upon his fitness to practice law, nor were his offenses crimes of moral turpitude as charged by the Disciplinary Commission.³¹ The Commission argued that the court's earlier decision in *In re Moore*³² was controlling.

In *Moore*, the respondent, a Deputy Prosecutor of Jennings County, was disbarred for failing to destroy marijuana plants which he knew to be growing on his premises, in violation of public trust and Disciplinary Rules 1-102(A)(1), (3) and (6).³³ The court noted that while the *Moore* case involved charges of professional misconduct similar to those in *Jones*, "the underlying factual [bases were] unique and distinct."³⁴ The court pointedly stated that "[t]he fact that marijuana was involved in both disciplinary actions does not mean that all issues in such cases are forever decided."³⁵ Citing *In re Gorman*,³⁶ the court emphasized that

²⁷See *Kizer v. Davis*, 174 Ind. App. 559, 369 N.E.2d 439 (1977).

²⁸464 N.E.2d 1281 (Ind. 1984).

²⁹*Id.*

³⁰*Id.*

³¹464 N.E.2d at 1281.

³²453 N.E.2d 971 (Ind. 1983).

³³*Id.* at 974.

³⁴464 N.E.2d at 1281.

³⁵*Id.* at 1282.

³⁶269 Ind. 236, 379 N.E.2d 970 (1978). In *Gorman*, the respondent was charged with moral turpitude based in part upon a criminal conviction for possession with intent

the issue for determination was not the "nature of the drug involved," but rather the "measure of Respondent's conduct viewed in toto, against his moral fitness to continue in the practice of law."³⁷

The court found that Jones, while seeking public office, had engaged in illegal conduct by possessing marijuana and hashish and driving under the influence of alcohol, thereby placing himself above the law and demonstrating a "total disregard for societal judgments relating to the possession of controlled substances."³⁸ The court also noted that Jones had endangered the public by driving while intoxicated.³⁹ Based upon this, the court held that "in its totality" Jones' conduct established that he was morally unfit to practice law and suspended him from practice for three years, foregoing disbarment in consideration of Jones' youth, inexperience, and his support from the Morgan County bench and bar.⁴⁰

In *Jones*, the court focused on the respondent's public position and the sum total of his conduct. Like *Turner*, the decision leaves unanswered the question of whether any one of the respondent's offenses standing alone would support discipline.

In another marijuana possession case based upon facts similar to *Jones*, the court ordered the identical sanction of three years suspension.

to distribute and distribution and conspiracy to distribute cocaine. Gorman admitted commission of "an illegal act (*malum prohibitum*), but denie[d] that he [had] done wrong (*malum in se*), arguing that the use of cocaine is neither addictive nor injurious to health" and, therefore, contended he did not commit moral turpitude. *Id.* at 237-38, 379 N.E.2d at 971. The court, citing *Baker v. Miller*, 236 Ind. 20, 24, 138 N.E.2d 145, 147 (1955), discussed the definition of moral turpitude at length, stating:

In proceedings of this character moral turpitude has always been a controlling factor in the disciplinary action to be taken by the court where there has been a charge of misconduct by a member of the bar. The problem of defining moral turpitude is not without difficulty. There is certain conduct involving fraud, perjury, theft, embezzlement, and bribery where there is no question but that moral turpitude is involved. On the other hand, because the law does not always coincide exactly with principles of morality there are cases that are crimes that would not necessarily involve moral turpitude. Acts which normally at common law were not considered wrong, do not by reason of statutory enactment making them a crime, add any element of moral turpitude. For example, willfully running a stop light or exceeding the speed limit does not necessarily involve moral turpitude.

Webster's International Dictionary (2d Edition) defines "turpitude" as: "Inherent baseness or vileness of principle, words, or actions; depravity."

Black's Law Dictionary (4th Edition) defines "moral turpitude" as: "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

³⁷464 N.E.2d at 1282 (quoting *In re Gorman*, 269 Ind. at 238, 379 N.E.2d at 971).

³⁸464 N.E.2d at 1282.

³⁹*Id.*

⁴⁰*Id.*

In *In re Thomas*,⁴¹ the respondent, a Deputy Prosecutor in Jackson County, Indiana, was stopped by a state police trooper for failing to make a complete stop at an intersection. The arresting officer subsequently found marijuana and hydrocodone, a Schedule II controlled substance, in the respondent's possession. Thomas was charged for these offenses, although the charges for possession of a controlled substance were eventually dropped. The respondent pleaded guilty to possession of marijuana and to the traffic offense.⁴²

In assessing discipline, the court, as in *Jones*, examined Thomas' conduct in its entirety, keying on the respondent's duty as prosecutor and the illegality of his conduct. The court determined that the conduct constituted moral turpitude and adversely reflected on the respondent's fitness to practice law.⁴³ Commenting on the sanction imposed for respondent's misconduct, the court stated:

In our assessment of an appropriate sanction, we observe that the Respondent violated the very laws he was obligated to enforce in his professional capacity as a Deputy Prosecutor. This, however, does not mean that the Respondent is being disciplined solely because he served as a public official. The use and possession of marijuana and controlled substances are illegal in this state and one need not be a Deputy Prosecutor to understand this illegality. . . . Obedience to the law exemplifies respect for law. . . . As lawyers, the members of the bar have a particular responsibility to demonstrate these principles.⁴⁴

This statement indicates that although possession and use of a controlled substance is viewed in the context of an attorney's total misconduct for purposes of determining whether he has engaged in moral turpitude, once that determination is made, the acts of misconduct will be viewed separately to determine a proper sanction. Thus, in *Thomas*, while a combination of misconduct including a traffic offense and possession of controlled substance by a deputy prosecutor were held to constitute moral turpitude, the illegality of respondent's act of possession was evaluated independently as a basis for his suspension.

The court had occasion to discuss cocaine addiction and its effect on an attorney's practice in *In re McCarthy*.⁴⁵ In *McCarthy*, the respondent attorney spent an average of \$2,000 a week to support his

⁴¹472 N.E.2d 609 (Ind. 1985).

⁴²*Id.*

⁴³*Id.* at 610.

⁴⁴*Id.*

⁴⁵466 N.E.2d 442 (Ind. 1984).

cocaine addiction. To finance his habit, McCarthy engaged in various acts of misconduct, including withdrawing money from an estate without authorization.⁴⁶ In addition, he wrote bad checks, failed to return a client's funds promptly, and was guilty of neglect.⁴⁷

Based upon these acts, the supreme court ordered McCarthy disbarred for violations of Canons 1, 6, 7, and 9.⁴⁸ Commenting on the respondent's cocaine addiction, the court stated:

It is indeed unfortunate when a person trained to be a professional loses grasp of priorities and subjugates professional responsibilities to the demands of an addiction. Apparently, Respondent has suffered this personal tragedy. But this is only a part of the total misfortune generated by this addiction. The results are equally calamitous to the client who is disserved by a person thought to be trusted.

The public must have confidence that when they place their trust in an attorney they will receive faithful, professional assistance. If an attorney cannot so respond, he is unfit to continue in the profession.⁴⁹

The respondent's addiction was not considered in mitigation of his offenses.⁵⁰

One month after its *McCarthy* decision, the court addressed another cocaine-related case in *In re Ewers*.⁵¹ In *Ewers*, the respondent placed an advertisement in a local newspaper seeking to hire " 'a recent female high school graduate desirous in working with horses.' " ⁵² Two female police department employees responded to the advertisement. They later met with respondent at which time all three used the respondent's cocaine. During a second meeting in which cocaine was also used, the respondent was arrested and charged with possession of cocaine⁵³ and possession

⁴⁶*Id.* at 443-44.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.* at 444.

⁵⁰*Id.*

⁵¹467 N.E.2d 1184 (Ind. 1984).

⁵²*Id.* at 1185.

⁵³IND. CODE § 35-48-4-6 (Supp. 1985), relating to possession of cocaine, provides: A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II commits possession of cocaine or a narcotic drug, a class D felony. However, the offense is a class C felony if the amount of the drug involved (pure or adulterated) weighs three (3) grams or more.

of Schedule VI⁵⁴ and Schedule II⁵⁵ controlled substances. Ewers entered a guilty plea and received a suspended sentence.

After Ewers' disciplinary hearing, he petitioned the supreme court for review of the hearing officer's finding of misconduct, arguing that his conduct failed to constitute "moral turpitude." The court, again applying its conduct in toto test, disagreed, noting that Ewers' acts of possessing cocaine and soliciting female high school graduates were not "the acts of experimenting youth," but were acts done with full knowledge that he was placing himself above the law.⁵⁶ The court found the acts to be "evidence of a baseness, vileness, and depravity in the social and private duties which an attorney owes to his fellowman."⁵⁷

Respondent further argued that even if he was guilty of misconduct, his conduct was not of the type that warranted disbarment. In response, the court repeated previously-established factors which may prompt court sanctions:

the nature of the violation, the specific acts of the Respondent, [the] Court's responsibility to preserve the integrity of the Bar, and the risk, if any, to which [the court] will subject the public by permitting the Respondent to continue in the profession or be reinstated at some future date.⁵⁸

The court also noted that in assessing the nature of the sanction to be invoked, it will look to the entire course of conduct involved, including uncharged misconduct.⁵⁹ The court then noted that in the case before

⁵⁴IND. CODE § 35-48-4-7 (Supp. 1985) (amended by P.L. 327-1985, § 4), relating to possession of Schedule I through V controlled substances, provides:

A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or adulterated) classified in schedule I, II, III, IV, or V, except marijuana or hashish, commits possession of a controlled substance, a class D felony.

⁵⁵*Id.*

⁵⁶467 N.E.2d at 1185.

⁵⁷*Id.*

⁵⁸*Id.* at 1186.

⁵⁹*Id.* (citing *In re Roberts*, 442 N.E.2d 986 (Ind 1983)). In *Roberts*, the respondent was charged by the Disciplinary Commission with failure to report the improper conduct of a venireman. At hearing, evidence revealed that the respondent had also filed a frivolous grievance against a trial judge. The hearing officer found both the charged and uncharged acts of the respondent to constitute misconduct. The respondent contended that the hearing officer committed error in considering the uncharged conduct and the court agreed. The court noted that an attorney is entitled to know the charges against him in advance of hearing. Disregarding the uncharged conduct, the court nonetheless found that the respondent had engaged in misconduct as charged in the complaint.

In determining the appropriate sanction based on such conduct, the court then looked to the entire course of the respondent's behavior, including the uncharged conduct omitted, in its assessment of violation of the Disciplinary Rules.

it respondent had made uncharged material misrepresentations in his criminal case pre-sentence report and in his answer to the Disciplinary Commission's complaint, thereby demonstrating "a complete disregard for professional obligations."⁶⁰ Because all of his acts, charged and uncharged, were "acts of a man not worthy of the respect of the legal profession," the court ordered disbarment.⁶¹

C. Alcohol Abuse

The Indiana Supreme Court's general posture regarding an attorney's abuse of alcohol was set forth in a 1978 case, *In re Erbecker*,⁶² in which the court stated:

This Court is not unmindful of the reality that many professional people drink intoxicating beverages, in varying degrees. It should be obvious that this Court cannot, and will not, impose discipline simply because an attorney drank an intoxicating beverage. The disciplinary rules of this Court do not require supererogatory conduct; these rules are based in reality. On the other hand, this Court cannot ignore its responsibility to impose discipline when the activities of an attorney demonstrate misconduct.⁶³

The court's statement clearly warns that there is a point beyond which alcohol use will not be tolerated. In the past, Indiana attorneys have been disciplined for appearing in court intoxicated,⁶⁴ for neglect while under the influence of alcohol,⁶⁵ and for alcohol-related misuse of a client's funds.⁶⁶ During this survey period, one alcohol-related disciplinary action resulted in disbarment.⁶⁷ Another case contained a pointed warning for attorneys who drive while intoxicated.⁶⁸

In *In re Hayes*,⁶⁹ the court ordered disbarment for an attorney found to have committed several disciplinary code violations under a two-count

⁶⁰*Id.* Respondent attributed his misrepresentations to alcohol and stress.

⁶¹*Id.*

⁶²268 Ind. 345, 375 N.E.2d 214 (1978). Erbecker was found to have missed two scheduled court hearings, neglected his obligations to his clients, and appeared in court in an intoxicated condition. He was publicly reprimanded by the court. *Id.* Cf. *In re Seely*, 427 N.E.2d 879 (Ind. 1981), in which the respondent was found to have appeared in court one hour late and intoxicated, staggered before the jury, and fallen asleep in court. Seely was suspended from practice for 90 days.

⁶³268 Ind. at 348, 375 N.E.2d at 215.

⁶⁴See cases cited in *supra* note 62.

⁶⁵See, e.g., *In re Vincent*, 268 Ind. 101, 374 N.E.2d 40 (1978).

⁶⁶See *id.*; see also *In re Althaus*, 264 Ind. 660, 348 N.E.2d 407 (1976).

⁶⁷*In re Hayes*, 467 N.E.2d 20 (Ind. 1984).

⁶⁸*In re Jones*, 464 N.E.2d 1281 (Ind. 1984).

⁶⁹467 N.E.2d 20 (Ind. 1984).

complaint. The respondent, a diagnosed alcoholic, was given money by his client to pay a tax liability assessed by the Internal Revenue Service. The client's funds were deposited in the respondent's trust account but later withdrawn by the respondent, who failed to make the tax payment. The client learned that the IRS had assessed additional interest against him and confronted the attorney who wrote two checks to the IRS on behalf of his client which were both returned for insufficient funds. Under a separate count, the respondent was found to have issued other bad checks.⁷⁰ The court found that he had engaged in misconduct through commingling, misrepresentation, moral turpitude, and conduct which was prejudicial to the administration of justice.⁷¹

In arriving at the sanction of disbarment based upon this conduct, the court took occasion to comment on its hearing officer's assessment that respondent's "moral and professional judgment were adversely affected" by his alcoholism. The court stated:

It is unfortunate that any person, whatever occupation or profession, suffer the personal tragedy generally associated with abuse of alcohol; this, however, does not vitiate the effects of professional misconduct. In this regard, the disease of alcoholism is not a valid basis of excuse. . . . Our responsibility is to safeguard the public from unfit lawyers, whatever the cause of unfitness may be.⁷²

The court noted that the respondent had sought treatment for his "disease" and had made restitution of all funds. Despite this, however, the court determined that his conduct posed a potential of harm to unsuspecting clients and demeaned the legal profession, thereby warranting the "strongest sanction available."⁷³

The *Hayes* decision is consistent with other disciplinary actions in which the respondent has pleaded his alcoholism as a mitigating factor.⁷⁴ In response to such pleading, the court has repeatedly stated that it will weigh any mitigating factors against its "duty to maintain a competent Bar and protect the public from . . . unethical conduct."⁷⁵ However,

⁷⁰*Id.*

⁷¹*Id.* at 21.

⁷²*Id.* at 22.

⁷³*Id.*

⁷⁴*See, e.g., In re Carmany*, 466 N.E.2d 16 (Ind. 1984); *In re Seely*, 427 N.E.2d 879 (Ind. 1981).

⁷⁵*See, e.g., In re Carmany*, 466 N.E.2d at 23. In *Carmany*, the respondent urged that the court consider his mental illness, marital, financial, and personal problems, including substance abuse, in mitigation of his misconduct. While the court apparently made such a consideration, it found no evidence to indicate the respondent had solved his problems. The court held that it was its duty to safeguard the public "from unfit lawyers whatever the cause of unfitness may be." *Id.* (citations omitted).

the court has noted in the past that it finds "little merit in any argument that an attorney should somehow be excused of misconduct by reason of the disease of alcoholism."⁷⁶

The second alcohol-related case decided during this period does not address alcoholism as a mitigating factor, but rather considers an attorney's alcohol-related personal misconduct. In *In re Jones*,⁷⁷ discussed previously in the context of substance abuse, one of the elements of total misconduct constituting moral turpitude charged against the respondent was his arrest for driving while intoxicated.⁷⁸ The court's hearing officer, after reviewing the facts of the respondent's case, had concluded that driving while intoxicated did not rise to the level of misconduct requiring disciplinary action. The court disagreed, finding the hearing officer's conclusion to be at odds with its policy of evaluating moral turpitude on totality of conduct.⁷⁹ Noting that driving under the influence endangers "every occupant of the highways," the court included respondent's arrest for this offense in assessing his total misconduct as moral turpitude.⁸⁰

Jones leaves unanswered the question of whether driving while intoxicated absent other misconduct will be considered moral turpitude subject to discipline. Nonetheless, it joins the court's *Turner*, *Ewers*, and *Thomas* decisions in clearly indicating that Indiana is among those jurisdictions which assess discipline for an attorney's personal misconduct aside from his practice of law. While these cases are wholly consistent with the current Code of Professional Responsibility, only the *Thomas* facts would command the same result under the new Model Rules of Professional Conduct under Rule 8.4 and its Comment.⁸¹ The court's *Turner*, *Ewers*, and *Jones* decisions would not appear to warrant discipline under the Model Rules given the Comment's instruction that a lawyer should be "professionally answerable" only for offenses "involving violence, dishonesty, or breach of trust or serious interference with the administration of justice," — offenses which "indicate lack of those characteristics relevant to law practice."⁸² Based upon this language, a reconciliation

⁷⁶*In re Vincent*, 268 Ind. 101, 111, 374 N.E.2d 40, 45 (1978). *But cf. In re Althaus*, 264 Ind. 660, 348 N.E.2d 407 (1976). In *Althaus*, the court specifically noted that the respondent's sanction would have been more severe if the court had not considered, in mitigation, respondent's alcoholic, domestic, and financial problems. *Id.*

⁷⁷464 N.E.2d 1281.

⁷⁸*Id.* at 1282.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹The Comment to Rule 8.4 states, "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney."

⁸²MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 and comment (1983).

of current Indiana case law and the new Model Rules, if adopted as written, may be difficult.

III. MISCELLANEOUS DECISIONS

During the Survey period, the court addressed several other disciplinary issues of first impression and unusual interest. In *Matter of McDaniel*,⁸³ the supreme court discussed a procedural issue of first impression involving the disciplinary process. The issue the case addressed was whether constitutional prohibitions against double jeopardy prohibit the filing of disciplinary charges based upon criminal charges for which an attorney has been acquitted in a criminal jury trial. The respondent was indicated and tried on charges of perjury and filing false police reports. A disciplinary action was also filed based upon the indictments. The respondent was acquitted in the criminal case, but the disciplinary action was not dismissed.

In response to respondent's claim of double jeopardy, the court held that disciplinary actions are not criminal proceedings and, therefore, "the application of constitutional standards generally afforded criminal defendants is not appropriate in all particulars."⁸⁴ The court further stated that the discipline of a member of the bar is independently determined from any other proceedings, including a criminal case.⁸⁵ Having found no constitutional prohibition to the disciplinary action, the court disbarred the attorney based upon a hearing officer's finding that the respondent had in fact committed perjury and submitted a false police report.⁸⁶

In *Matter of Allen*,⁸⁷ the court dealt with an alleged violation of Disciplinary Rule 9-101(C), which provides that an attorney "shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."⁸⁸ In *Allen*, the respondent-attorney recommended that his client employ co-counsel for an upcoming criminal drug case. The reason given by the attorney for the hiring recommendation was that co-counsel had a relationship with the judge, had dinner with the judge, played golf with the judge, and discussed the outcome of his cases with the judge.⁸⁹ Respondent represented that if the other attorney were employed as co-counsel he could affect the outcome of the case in the defendant's favor.⁹⁰ The court found that this

⁸³470 N.E.2d 1327 (Ind. 1984).

⁸⁴*Id.* at 1328.

⁸⁵*Id.*

⁸⁶*Id.* at 1332.

⁸⁷470 N.E.2d 1312 (Ind. 1984).

⁸⁸IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-101(c) (1984).

⁸⁹470 N.E.2d at 1313.

⁹⁰*Id.*

type of representation to the client offended the Code of Professional Responsibility and suspended respondent from the practice of law for one year.⁹¹ The court's rationale for imposing such a sanction is perhaps best stated in its own words:

[W]e are convinced that the recommendation to hire this attorney was made by the Respondent not because of superior skills or knowledge in criminal defense work, but because of an alleged personal relationship with the judge. The implication is not that of simply good professional rapport or mutual respect between lawyer and judge; it is an implication of a special standing in which the proposed co-counsel routinely speaks to the judge about cases, outside the courtroom, and by which method the proposed co-counsel could achieve special treatment for the defendant, an outcome which could not be achieved through regular channels. . . . A client, as in this case, finding himself in the precarious position of being face to face with a serious felony conviction and a lengthy incarceration, becomes the perfect subject for the sort of subtle persuasion present in the Respondent's representations. Swayed by the enticement of an "in" with the judge, the client agreed to hire a co-counsel who was paid \$5,000.00 as a fee. When the anticipated outcome did not transpire, the Respondent blamed the co-counsel and the co-counsel's representations as to influence with the court. The unwitting client, already in a difficult situation, is ready to believe in and is happy to pay for what he perceives to be the easy way out of his predicament. This sort of practice cannot be allowed to persist. It is damaging to the client and prejudices his legitimate interests. The aspersions cast on the judiciary of this state, upon our system of justice, upon the entire legal profession, serve to destroy the public's confidence in our institutions.⁹²

In a third case, *Matter of Berning*,⁹³ the court addressed the extent to which attorneys may make contact with jurors. In *Berning*, a prosecuting attorney sent a letter to jurors who had recently completed deliberations in a criminal case. The jury had acquitted a defendant who had been charged with assault and battery arising out of a domestic dispute. The respondent's letter to the jurors expressed shock and displeasure with the verdict and read in part:

Needless to say, everyone involved in the prosecution of the case was terribly upset and shocked at the verdict of not guilty. Marilyn

⁹¹*Id.* at 1316.

⁹²*Id.* at 1314-16.

⁹³468 N.E.2d 843 (Ind. 1984).

Martin had the difficult task of trying to explain to her children why Mr. Martin was able to get away with such an act without being punished for it. The victim was in tears because the finding of not guilty meant to her that the jury felt that she was a liar. The mother of the victim was in tears for the same reason. Even Steve Mullins was visibly upset by the finding of not guilty, and he is, in my opinion, not the type to let adverse decisions affect him emotionally. However, my purpose in writing is not to "cry over spilled milk" because we lost the decision.⁹⁴

The letter then advised the jurors to contact the prosecutor so that he would re-evaluate his office's policy concerning the handling of instances of domestic violence.⁹⁵

During respondent's disciplinary hearing, the jurors testified that they were embarrassed and displeased by receipt of the letter.⁹⁶ Some jurors testified that receipt of the letter might influence them in future deliberations.⁹⁷

The court found a clear violation of Disciplinary Rule 7-108(D),⁹⁸ which provides that an attorney may not ask questions of or make comments to a member of the jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.⁹⁹ Respondent was publicly reprimanded.¹⁰⁰

⁹⁴*Id.* at 844.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.* at 845.

⁹⁹IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-108(D) (1984).

¹⁰⁰468 N.E.2d at 845.

Indiana's Development of a Definitive Legal Malpractice Statute of Limitations

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I. INTRODUCTION

While a number of noteworthy developments have occurred during the survey period, legal malpractice decisions lurk in the forefront.¹ In the wake of every rising lawyer's professional liability insurance premiums,² the crystalization of legal standards serves to stabilize these costs. After the Supreme Court of Indiana rendered its decision in *Shideler v Dwyer*,³ many observers considered the statute of limitations applicable to legal malpractice cases a settled area of the law. However, it was necessary for the court once again to address the question of the proper statute of limitations for a legal malpractice action in *Whitehouse v. Quinn*.⁴ This was made necessary by an Indiana Court of Appeals decision⁵ which, contrary to *Shideler*, imposed a limitation period longer than two years. Thus, this Article will review the tortured developments of the statute of limitations as applied to legal malpractice actions recently culminating in the *Whitehouse v. Quinn*⁶ case which, it is hoped, will finally be determinative in this area.

II. DISTRICT SPLIT

Prior to the Supreme Court of Indiana's decision in *Shideler v. Dwyer*,⁷ the different districts of the Court of Appeals of Indiana had reached divergent results as to which statute of limitations applies to legal malpractice cases.⁸ This divergence is largely explained by a lack

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¹One other very recent case outside the malpractice context should be noted. In *Commodity Futures Trading Com. v. Weintraub*, 105 S. Ct. 1886 (1985), the United States Supreme Court held that a corporation's trustee in bankruptcy may waive the attorney-client privilege.

²See 29 RES GESTAE, no. 2, at p. 22 (July, 1985).

³275 Ind. 270, 417 N.E.2d 281 (1981).

⁴477 N.E.2d 270 (Ind. 1985).

⁵*Whitehouse v. Quinn*, 443 N.E.2d 332 (Ind. Ct. App. 1982), *aff'd in part, rev'd in part*, 477 N.E.2d 270 (Ind. 1985).

⁶*Id.*

⁷275 Ind. 270, 417 N.E.2d 281.

⁸See Jackson, *Survey—Professional Responsibility and Liability*, 14 IND. L. REV. 433, 455-57 (1981).

of contemporary guidance from Indiana's highest judicial authority. Those supreme court cases which presented this question were decided in the era of Field Code pleading.⁹ This uncertainty caused the various appellate districts in Indiana to develop divergent theories regarding the limitations period to be applied to legal malpractice actions.

In *Cordial v. Grim*, the Third District of the Court of Appeals of Indiana held that legal malpractice was limited by Indiana Code section 34-4-19-1.¹⁰ That section states that an action is timely if it is filed within "two (2) years from the date of the act, omission or neglect complained of."¹¹ Although the statute¹² by its terms only expressly mentions professional medical misconduct, the court held the general wording of the statute evidenced an intent to cover members of the bar.¹³ Ultimately, the Supreme Court of Indiana overruled this theory.¹⁴ The court held "the doctrine of *ejusdem generis* limits the application of the term 'or others,' as used in said statute, to others of the medical care community."¹⁵

The court of appeals in *Cordial* also analyzed sections one and two of Indiana Code chapter 34-1-2 as an alternate ground for holding that these causes of action were barred under the statute of limitations. The court determined that when a tort arises out of a duty created by an implied contract of employment, the court must decide whether the nature of the resulting action is *ex contractu* or *ex delicto* in order to determine any limitation on the commencement of the action.¹⁶ Were a court to accept a cause of action as arising from a breach of a promise set forth in a contract and thus conclude the action was *ex contractu*, a plaintiff would save an otherwise stale claim under the longer statute of limitations for contract actions. An action based upon "contracts not in writing" must "be commenced within six (6) years after the cause of action has accrued."¹⁷ Actions based upon "contracts in writing"

⁹See, e.g., *Boor v. Lowrey*, 103 Ind. 468, 3 N.E. 151 (1885); *Foulks v. Falls*, 91 Ind. 315 (1883); *Burns v. Barenfield*, 84 Ind. 43 (1882); *Stanley v. Jameson*, 46 Ind. 159 (1874).

¹⁰169 Ind. App. 58, 67-68, 346 N.E.2d 266, 272 (1976) (overruled by *Shideler*, 275 Ind. at 272, 417 N.E.2d at 283).

¹¹IND. CODE § 34-4-19-1 provides: "No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any court of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

¹²*Id.*

¹³*Cordial*, 169 Ind. App. at 67-68, 346 N.E.2d at 272.

¹⁴*Shideler*, 275 Ind. at 272, 417 N.E.2d at 283.

¹⁵*Id.*

¹⁶*Cordial*, 169 Ind. App. at 61-64, 346 N.E.2d at 269-70.

¹⁷IND. CODE § 34-1-2-1 (1982).

must commence within ten years after the cause of action has accrued or within twenty years if the contract was entered into before September 1, 1982.¹⁸

Although the plaintiff may plead the cause of action as a breach of contract, the court held that the *substance* of the actual allegations will control the applicability of the statute of limitations.¹⁹ The general rule is that, especially where forms of action have been abolished, as in Indiana, it is the nature or substance of the cause of action, rather than the form of the action, which determines the applicability of the statute of limitations.²⁰

In *Cordial*, the attorney's actions or inactions were alleged to have rendered his client's claim worthless. Rather than analyze the conduct of the wrongful party, the court in *Cordial* appeared to consider the nature of interest harmed as being the central focus for determining the nature or substance of the cause of action. Thus, the court concluded that the "claim was a chose in action, and as such, must be considered to have been personal property of the [client]."²¹ A chose in action, especially in its broadest sense, is an interest in or a right to recover by a suit recognized at law.²² The term can encompass all rights of action whether pled in tort or contract.²³ Accordingly, a chose in action is viewed as being personal property. In *Cordial*, the interest harmed, the focal point for determining the nature of the claim, was a loss of the plaintiff's chose in action. Consequently, the trial court could have properly found the two-year statute of limitations in Indiana Code section 34-1-2-2(1), which limits actions for injuries to personal property, to be applicable.²⁴

However, in *Shideler*, the First District of the Court of Appeals of Indiana reasoned that Indiana Code section 34-1-2-2 was the proper statute to apply to legal malpractice cases.²⁵ Without determining the applicability of the statute of limitations to the case, the First District developed an intermediate step. Before a statute of limitations may be applied, the trier of fact, or if the facts are undisputed, the trial judge must determine the proximate cause of the action.²⁶ Once the proximate

¹⁸IND. CODE § 34-1-2-2(6) (1982).

¹⁹*Cordial*, 169 Ind. App. at 61-63, 346 N.E.2d at 269.

²⁰*Id.* at 63, 346 N.E.2d at 269 (quoting *Koehring Co. v. National Automatic Tool Co.*, 257 F. Supp. 282, 292 (S.D. Ind. 1966)).

²¹*Cordial*, 169 Ind. App. at 63-64, 346 N.E.2d at 270.

²²*McNevin v. McNevin*, 447 N.E.2d 611, 615-16 (Ind. Ct. App. 1983).

²³*Id.*

²⁴*Cordial*, 169 Ind. App. at 63-64, 346 N.E.2d at 270.

²⁵179 Ind. App. 622, 386 N.E.2d 1211, 1216 (1979), *vacated*, 275 Ind. 270, 417 N.E.2d 281 (1981).

²⁶386 N.E.2d at 1216.

cause is determined, it follows that the harm resulting from the proximate cause can be ascertained. The statute of limitations in Indiana Code section 34-1-2-2 can then be applied from the date the proximate cause manifested itself in the harm complained of by the plaintiff.²⁷

Under the facts of *Shideler*, the attorney prepared a will for Robert Moore. Moore's will made a precatory request of a devisee receiving shares of stock under the will to cause the corporation to pay the plaintiff five hundred dollars per month as a retirement benefit. Within two years after the date on which the probate court entered a decree declaring the precatory provision null and void, the plaintiff filed a malpractice action against the attorney who had drafted the will. The court of appeals held it was proper for the matter to be submitted to the jury for a determination of when the causal factor manifested itself in a redressable injury for purposes of commencing the running of the statute.²⁸

III. DEFINITIVE RULING

As can be seen from the preceding discussion, two of the four Indiana appellate districts appeared to be divided both as to the particular factors which would implicate a given statute and the applicability of the professional medical care malpractice statute in the context of a claim for legal malpractice. As a result of the conflict in the districts, the mechanics of the statute of limitations in a legal malpractice case became ripe for determination by the Supreme Court of Indiana. Not only was there confusion about which statute of limitations applied, but also at what point the statute began to run for purposes of determining whether the statute barred the claim. In *Shideler v. Dwyer*,²⁹ the supreme court made what was considered by many observers to be an exhaustive review of the statute of limitations for legal malpractice.³⁰

The supreme court first summarily disposed of the application of Indiana Code section 34-4-19-1 to legal malpractice under the doctrine of *ejusdem generis*.³¹ The policy solidifying the longevity of the statute of limitations then was recounted by the court at the outset of its opinion. "Such statutes rest upon sound public policy and tend to the

²⁷*Id.*; accord *Anderson v. Anderson*, 399 N.E.2d 391 (Ind. App. 1979).

²⁸386 N.E.2d at 1217.

²⁹275 Ind. 270, 417 N.E.2d 281.

³⁰See, e.g., *Keystone Dist. Park v. Kennerk, Dumas, Burke, Backs, Long and Salin*, P.C., 461 N.E.2d 749, 751 (Ind. Ct. App. 1984); *Yaksich v. Gasteovich*, 440 N.E.2d 1138, 1139 (Ind. Ct. App. 1982).

³¹*Shideler*, 275 Ind. at 272, 417 N.E.2d at 283.

peace and welfare of society and are deemed wholesome.”³² “ ‘[S]ince they are considered as statutes of repose and as affording security against stale claims . . . , the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature.’ ”³³

With its course established in the policies supporting statutes of limitations, the supreme court noted the plaintiff had alleged substantive causes of actions “charging: (1) breach of contract, (2) negligence, (3) fraud, (4) constructive fraud, and (5) breach of fiduciary duty.”³⁴ The flexibility of notice pleading under the modern rules of civil procedure make such alternate pleading commonplace. Considering the ease with which a party may draft such substantive alternatives, it is not surprising that the court stated, “[S]uch method of pleading . . . will not control the limitations period.”³⁵

Rather than randomly selecting the statute of limitations based upon the form of the pleading as set forth by a plaintiff, the proper analysis appears to require a court to determine the nature or substance of the action. As in the alternate analysis utilized by the *Cordial* court, the supreme court evaluated the nature of the interest injured rather than relying upon the substantive theory under which the plaintiff sought to redress the harm for purposes of determining the applicable statute.³⁶ A claim of malpractice against an attorney alleges a loss of a chose in action. In undertaking a thorough evaluation of what interest is at stake in a malpractice claim, the court recognized that personal property “ ‘includes not only the thing itself but all the rights and interests of the owner.’ ”³⁷ “Property is more than the physical object which a person owns. It includes the right to acquire, possess, use, and dispose of it without control or diminution. . . .”³⁸ Where a plaintiff, such as Dwyer, claims a loss of a right to receive money as a result of the actions or omissions of an attorney, there is “a claim for injuries to ‘rights or interests in or to’ personal property.”³⁹ This reasoning necessarily rejects a narrow definition of personal property. For purposes of the statute of limitations, it does not appear personal property will be merely

³²*Id.* at 273, 417 N.E.2d at 283 (citing *Horvath v. Davidson*, 148 Ind. App. 203, 264 N.E.2d 328 (1970); *Sherfey v. City of Brazil*, 213 Ind. 493, 13 N.E.2d 568 (1938); *High et al. v. Bd. of Comm’rs of Shelby County*, 92 Ind. 580, 589 (1883)).

³³*Shideler*, 275 Ind. at 273, 417 N.E.2d at 283 (quoting 51 AM. JUR. 2D *Limitations of Actions* § 50 (1970)).

³⁴*Shideler*, 275 Ind. at 276, 417 N.E.2d at 285.

³⁵*Id.*

³⁶*Id.* at 279-81, 417 N.E.2d at 287-88.

³⁷*Id.* at 279, 417 N.E.2d at 287 (quoting *Rush v. Leiter*, 149 Ind. App. 274, 278, 271 N.E.2d 505, 507 (1971)).

³⁸*Dept. of Financial Inst. v. Holt*, 231 Ind. 293, 303, 108 N.E.2d 629, 634 (1952).

³⁹*Shideler*, 275 Ind. at 281, 417 N.E.2d at 288.

confined to tangible chattel property as distinguished from violations of intangible rights in and to personal property.

Having determined that a claim of legal malpractice asserts a deprivation of a party's interest in personal property,⁴⁰ it follows that the injury to personal property will be limited by Indiana Code section 34-1-2-2(1). Injuries to personal property must be redressed by an action commenced within two years after the cause of action has accrued.

While the importance of the form of the action pled was clearly dispelled by the *Shideler* court as one of the indices for determining the nature of the action, the *Shideler* decision unfortunately did not prove to be dispositive of the issue. In *Whitehouse*, the Second District Court of Appeals of Indiana confronted a legal malpractice claim which alleged, among other actions, that the attorney had failed to fulfill a promise contained in a written employment contract; this cause of action was held to be covered by the statute of limitations governing written contracts.⁴¹

In rendering this decision, the court of appeals looked to several factors in determining that the twenty year period of section 34-1-2-2 (6) applied. The court found that the claim was predicated upon an express, written promise of an attorney to prosecute all individuals legally responsible for the plaintiff's injury. The attorney-client contract in *Whitehouse* was viewed as being distinguishable from the remote and indirect connection between the attorney and plaintiff in *Shideler*.⁴² The nonperformance by the defendant-attorney of an express promise to the plaintiff was viewed as a breach of contract claim.⁴³ The court of appeals relied on a vintage supreme court case⁴⁴ in concluding that an action predicated upon a written instrument is based in contract, not in tort.⁴⁵

The court of appeals' reasoning in *Whitehouse* was categorically rejected by the supreme court. Holding steadfastly to its reasoning in *Shideler*, the court held that it is necessary to "identify the substance of the cause of action by inquiring into the nature of the alleged harm."⁴⁶ *Whitehouse* had a right to file suit against the state of Indiana. As such, he possessed a chose in action and thus held a personal property interest. The claim made was that this personal property interest had been damaged as a result of a breach of duty assumed under a contract.

⁴⁰*Id.*

⁴¹443 N.E.2d 332 (Ind. Ct. App. 1982), *aff'd in part, rev'd in part*, 477 N.E.2d 270 (Ind. 1985).

⁴²*Id.* at 337-38.

⁴³*Id.* at 336-37.

⁴⁴*Foulks v. Falls*, 91 Ind. 315 (1883).

⁴⁵*Whitehouse*, 443 N.E.2d at 336-37.

⁴⁶*Whitehouse*, 477 N.E.2d at 274.

However, the court reasoned that the existence of a written contract did not change the nature of the claim.⁴⁷ Whether Quinn's conduct was a breach of a common law duty so as to constitute a tort or a breach of a contractual duty so as to constitute a breach of a contract, the conduct *resulted* in an injury to Whitehouse's personal property. Thus, because the substance of the claim of the malpractice action was an injury to personal property, the court applied Indiana Code section 34-1-2-2(1), which governs injuries to personal property, including those caused by legal malpractice.

Thus, the statute of limitations applicable to any legal malpractice case in which a plaintiff alleges damage to a claim which he possessed before the breach of a duty once again appears to be clear. Regardless of the existence of a contractual, fiduciary, or other unique relationship between the plaintiff and an attorney, the cause of action must be brought within two years after the point when the cause of action accrued. The court painstakingly noted that there should not be a longer statute of limitations applicable to parties who have contracted, expressly or impliedly, with an attorney who committed malpractice. "This would create an artificial distinction between actions for personal injuries or personal property damage by non-contracting parties and those where some contractual relationship could be alleged."⁴⁸ Such an artificial distinction would not effectuate the policy set forth by the legislature in the statutes.

The supreme court's decision in *Whitehouse* should be the death knell to arguments alleging that injuries to personal property from acts of legal malpractice are covered by longer statutes or limitations. It again appears settled that stale claims of legal malpractice will be limited by two-year limitation periods under Indiana Code section 34-1-2-2(1).⁴⁹ However, the *Whitehouse* decision does not answer all the questions relating to the statute of limitations. Factual arguments and legal issues remain abundant regarding the issue of when a cause of action for malpractice accrues so as to commence the running of the statute.

To commence a legal malpractice action properly, the lawsuit must be filed within two years after the date upon which the cause of action accrued. Difficulty may arise in determining the date on which the statute begins to run. In the abstract, the statute begins to run at the point there is an actionable wrong. The wrongful conduct is actionable only

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹Where an act of legal malpractice results in an injury to property other than personal property, a plaintiff should be able to assert effectively that the six-year limitations period of IND. CODE § 34-1-2-1 (1982) is applicable.

when an invasion of a personal right, recognized in the law, produces an injury.⁵⁰ "[I]t is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."⁵¹

However, as a general proposition, it is not necessary that a plaintiff know or should have known of his injury at the hands of his lawyer for the statute to commence running; rather, it is only necessary that the cause of action has accrued.⁵² A cause of action accrues at the instant the conduct coalesces into an injury or harm. The court characterizes this coalescence as an irremediable harm.⁵³ At this instant, the wrong has manifested itself into a certain injury. Although the extent of damage may be speculative, the fact is established that the plaintiff has been injured and the cause of action will accrue.

While this interpretation could be viewed as yielding a harsh result, especially to a plaintiff who has experienced an injury which does not develop into a discoverable harm until the statute has lapsed, the policy of repose for the sake of peace is a paramount concern which has been recognized by the legislature. Hidden injuries, which may also pose a serious threat to the peace and the general welfare, may be protected against under the existing tolling principle. These tolling principles attempt to balance judicially valid claims with the interests expressed by our legislature in the statute of limitations.

Where there is a continuing fiduciary relationship, as in the attorney-client relationship, the attorney should be required to disclose all material information relating to the relationship. Failure to do so may well toll the statute of limitations until the relationship terminates. The supreme court has articulated this principle in the context of a physician-patient relationship.⁵⁴ The court of appeals in *Whitehouse* undertook a complete review of this principle. The court was unable to recognize any tolling under the facts presented because the plaintiff failed to allege sufficient facts to prove there was a continuation of the attorney-client relationship after the wrongful conduct had occurred.⁵⁵ These findings were incorporated by reference in the supreme court's opinion.⁵⁶

⁵⁰*Shideler*, 275 at 283-86, 417 N.E.2d at 289-91.

⁵¹*Id.* at 282, 417 N.E.2d at 289.

⁵²*Id.* at 284, 417 N.E.2d at 290.

⁵³*Id.*

⁵⁴"[W]here the duty to inform exists by reason of a confidential relationship, when that relationship is terminated the duty to inform is also terminated; concealment then ceases to exist. After the relationship of physician and patient is terminated the patient has full opportunity for discovery and no longer is there a reliance by the patient nor a corresponding duty of the physician to advise or inform. The statute of limitations is no longer tolled by any fraudulent concealment and begins to run." *Guy v. Schuldt*, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956); *accord* *Conard v. Waugh*, 474 N.E.2d 130, 135 (Ind. Ct. App. 1985).

⁵⁵443 N.E.2d at 339, *aff'd on this ground*, 477 N.E.2d at 272.

⁵⁶477 N.E.2d at 272.

The more difficult issue arises when there is no affirmative act by an attorney to mislead a former client, both where the attorney knew or should have known of his wrongful conduct. A plaintiff may assert that without training in law, a layperson is unable to ascertain whether malpractice has been committed, and thus, the statute should be tolled until the wronged party discovers the concealment. Such a broad discovery rule as this would, however, significantly alter the effect of having a statute of limitations. After the original attorney-client relationship has terminated, a potential plaintiff has a clear opportunity to seek independent counsel. A person's personal interest in seeking redress from an actionable harm, absent active fraud, is deemed to be valid in our system of justice only when commenced in a timely manner. If the courts were to recognize passive concealment as grounds for tolling the statute of limitations, all plaintiffs would argue their former attorney should have known of wrongful conduct and thus disclosed it. These general notions of fair play underlying the statute overwhelm the arguments supporting such a judicial opening of Pandora's box.

The supreme court has not completely foreclosed a discovery exception in the area of legal malpractice.⁵⁷ It would seem appropriate in instances in which an attorney has committed an act of misrepresentation for the attorney to be estopped from asserting the statute of limitations as a defense; the law should never foster an active fraud.⁵⁸

Beyond the tolling of the statute of limitations where there is active fraud or a continuing fiduciary relationship, there was a noticed expansion of the tolling principles in *Barnes v. A.H. Robins Co., Inc.*⁵⁹ In its answer to a certified question from the Seventh Circuit Court of Appeals, the Indiana Supreme Court ruled a statute of limitations was tolled because "the misconduct is of a continuing nature and is concealed."⁶⁰ The court limited its findings "to the precise factual pattern related by the certified question which is an injury to a plaintiff caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance."⁶¹ The applicability of this exception to legal malpractice cases should be viewed as an extremely limited opening for plaintiffs to argue that the statute is tolled. Implicit in the factual circumstance in *Barnes* was the plaintiff's exposure to conduct which

⁵⁷See *Shideler*, 275 Ind. at 286-87, 417 N.E.2d at 291.

⁵⁸Active or affirmative misconduct on the part of a physician tolls the statute of limitations until the plaintiff discovers the wrongful conduct. *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891 (1956).

⁵⁹476 N.E.2d 84 (Ind. 1985).

⁶⁰*Id.* at 87.

⁶¹*Id.*

continued to create new and additional harm. The court found further that the conduct must be of a concealed nature.

Factually, a parallel situation may develop in certain claims for legal malpractice. For example, when a wrongful act by an attorney is relied upon by a known third party beneficiary in consummating a series of actions subsequent to the act of malpractice, the injury resulting to such a person might be characterized as being of a continuing nature. Had the wrongful conduct not been concealed from the third party, there would not have been a continuing reliance upon the original wrongful act. Without this reliance, there would not have been a continuing harm. Such a factual scenario would likely cause plaintiffs to argue that *Barnes* is authority for tolling the statute of limitations in a context of legal malpractice. However, this argument should be viewed as having relatively little chance of success because of the supreme court's strong language favoring a two-year statute (in both *Shideler* and *Whitehouse*).

III. CONCLUSION

Because of the nature of legal malpractice claims, injury usually occurs to a person's rights to an interest in personal property. It appears clear that a suit to enforce a claim alleging legal malpractice which resulted in injury to personal property must be brought within two years after the occurrence of the injury. However, there may be some latitude for argument regarding when the statute begins to run. Henceforth, plaintiffs will likely place more emphasis on developing factual arguments supporting the tolling of the statute or the use of a later date upon which to fix accrual of the cause of action. Such determinations may be used by our courts in an effort to balance any perceived inequities in a two-year statute of limitations. However, given the supreme court's strong language in *Shideler* and *Whitehouse*, this should occur infrequently.

Indiana's Living Wills and Life-Prolonging Procedures Act

JEFFREY B. KOLB*

I esteem it the office of a physician not only to restore health, but to mitigate pain and dolours; and not only when such mitigation may conduce to recovery, but when it may serve to make a fair and easy passage.

-Sir Francis Bacon (1561-1626)

I. INTRODUCTION

More than eight years after living will legislation was first introduced, Indiana has adopted the Living Wills and Life-Prolonging Procedures Act (the "Act").¹ Backed by state medical organizations, the legislation was ultimately successful when the Catholic Archdiocese of Indianapolis, after input to the Act, discontinued its opposition and Senate opponents compromised with the inclusion of a provision allowing an individual to request all possible life-prolonging treatment.² Indiana now joins numerous other states and the District of Columbia with similar legislation.³

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¹IND. CODE §§ 16-8-11-1 to -22 (Supp. 1985).

²*Society for the Right to Die Newsletter* 4 (Spring 1985) (available in *Indiana Law Review* Office). The author is indebted to the Society for the Right to Die for the publications and materials provided to the public.

³See, e.g., Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to -10 (1984); Arizona Medical Treatment Decision Act, 1985 ARIZ. SESS. LAWS chp. 199 (to be codified at ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210); Arkansas Death with Dignity Act, ARK. STAT. ANN. §§ 82-3801 to -3804 (1977); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1976); Colorado Medical Treatment Decision Act, COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1985); Delaware Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-2509 (1982); District of Columbia Natural Death Act of 1981, D.C. CODE ANN. §§ 6-2421 to -2430 (Supp. 1985); Florida Life Prolonging Procedure Act, FLA. STAT. §§ 765.01-15 (Supp. 1985); Georgia Living Wills Act, GA. CODE §§ 31-32-1 to -12 (1984); Idaho Natural Death Act, IDAHO CODE §§ 39-4501 to -4508 (Supp. 1984); Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, §§ 701-710 (Smith-Hurd 1984); Indiana Living Will and Life-Prolonging Procedures Act, IND. CODE §§ 16-8-11-1 to -22 (Supp. 1985); Iowa Right to Decline Life-Sustaining Procedures Act, 1985 IOWA ACTS S.B. 25 chp. 3 (to be codified at IOWA CODE §§ 144 A.1-11); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28, 101-109 (1979); Louisiana Natural Death Act, LA. REV. STAT. ANN. §§ 40:1299.58.1-10 (West Supp. 1985); Miss. CODE ANN. §§ 41-41-101 to -121 (Supp. 1984); Montana Living Will Act, MONT. CODE ANN. §§ 50-9-101 to -104, § 50-9-111, §§ 59-9-202 to -206 (1983); Nevada Withholding or Withdrawal of Life-Sustaining Procedures, NEV. REV. STAT. §§ 449.540-690 (1977); New Hampshire Living Will Act, N.H. REV. STAT. ANN. ch. 137-H1:2-16 (1985); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-2 to -10 (1977);

Living will laws are the legislative response to problems caused by improved medical capabilities to prolong life. Increasingly, courts have been called on to determine whether a certain medical treatment or procedure should be withheld or withdrawn even though death may result.⁴ Relying on common law concepts of self-determination and, in some cases, constitutional guarantees of privacy,⁵ the courts have made significant but conflicting contributions to this area of the law. To avoid a case-by-case analysis and judicial intervention in an emotionally charged area of the law, the courts have joined with organized groups in calling for a legislative response removing courts from this process.⁶ Living will laws allow an individual to execute a written declaration which permits physicians and other health care providers, without prior court approval, to withhold or withdraw a specified medical treatment or procedure under certain circumstances without adverse legal consequences.

II. OVERVIEW OF THE LIVING WILL ACT

While a living will declaration is something that every individual should consider and that many individuals will execute, the actual use

North Carolina Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320 to -322 (1983); Oklahoma Natural Death Act, OKLA. STAT. tit. 63, §§ 3101-3111 (1985); Oregon Rights with Respect to Terminal Illness Act, OR. REV. STAT. §§ 97.050-.090 (1983); Tennessee Right To Natural Death Act, TENN. CODE ANN. §§ 32-11-101 to -110 (1985); Texas Natural Death Act, TEX. STAT. ANN. art. 4590th (Vernon 1983); Utah Personal Choice and Living Will Act, UTAH CODE ANN. §§ 75-2-1101 to -1118 (1985); Vermont Terminal Care Document, VT. STAT. ANN. tit. 18, §§ 5251-5262 (Supp. 1985); Virginia Natural Death Act, VA. CODE §§ 54-325.8:1-12 (Supp. 1985); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70,122.010-.905 (Supp. 1985); West Virginia Natural Death Act, W. VA. CODE chap. 16 art. 30, §§ 1-10 (1984); Wyoming Act, WYO. STAT. §§ 33-26-144 to -152 (1984).

⁴See, e.g., *Bartling v. Superior Court*, 103 Cal. App. 2d 186, 209 Cal. Rptr. 220 (1984); *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 482 A.2d 713 (1984); *Severns v. Wilmington Medical Center, Inc.*, 421 A.2d 1334 (Del. 1980); *Tune v. Walter Reed Army Medical Hospital*, 602 F. Supp. 1452 (D.C. 1985); *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); *In re Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984); *In re Spring*, 380 Mass. 629, 403 N.E.2d 115 (1980); *Superintendent of Belchertown State Schools v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *In re Torres*, 357 N.E.2d 332 (Minn. 1984); *In re Conroy*, 188 N.J. Super. 523, 457 A.2d 1232 (1983), *rev'd*, 190 N.J. Super. 453, 464 A.2d 303 (1983), *rev'd*, 90 N.J. 321, 486 A.2d 1209 (1985); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976); *In re Storar*, 438 N.Y.2d 266, 420 N.E.2d 64 (1981); and *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

⁵See, e.g., *Severns*, 421 A.2d 1334 (Del. 1980); *Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

⁶See, e.g., *Severns*, 421 A.2d 1334 (Del. 1980); *Satz*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); *Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *Storar*, 438 N.Y.2d 266, 420 N.E.2d 64 (1981); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

of the declaration is only permitted under limited and well-defined circumstances. Indiana's living will declaration applies when:

- (1) a competent adult⁷
- (2) executes⁸
- (3) a declaration substantially the same as set out in the statute,⁹
- (4) notifies the attending physician of the existence of the declaration,¹⁰
- (5) does not revoke the declaration,¹¹
- (6) becomes incompetent, but is not pregnant,¹²
- (7) is certified in writing by the attending physician as a qualified patient,¹³ and
- (8) is attended by a physician who will withhold the medical treatment.¹⁴

The Living Will Act describes the legal consequences resulting from compliance with the Act and the legal penalties for its violation.¹⁵ Indiana's Living Will Act also addresses issues outside the typical living will concerns. For example, the Act allows individuals to execute a declaration requiring that all possible life-prolonging procedures be used.¹⁶ In addition, the Act expressly allows competent individuals to control their medical treatment, including the withholding of medical treatment without a living will declaration.¹⁷

III. INDIVIDUAL COMPONENTS OF THE LIVING WILL ACT AND LIVING WILL DECLARATION

A. Those Who May Make a Living Will Declaration

A person who is of sound mind and at least eighteen years old may execute a living will declaration.¹⁸ The execution must be voluntary.¹⁹

⁷IND. CODE § 16-8-11-11(a) (Supp. 1985).

⁸*Id.* § 16-8-11-11(b).

⁹*Id.* § 16-8-11-12.

¹⁰*Id.* § 16-8-11-11(e).

¹¹*Id.* § 16-8-11-13.

¹²*Id.* § 16-8-11-11(d).

¹³*Id.* § 16-8-11-14.

¹⁴*Id.*

¹⁵See IND. CODE §§ 16-8-11-15 to -22 (Supp. 1985).

¹⁶*Id.* § 16-8-11-12(c).

¹⁷*Id.* § 16-8-11-1.

¹⁸*Id.* § 16-8-11-11(a).

¹⁹*Id.* § 16-8-11-11(b).

The Living Will Act allows the hospital or physician, in the absence of actual notice to the contrary, to presume that the declarant was of sound mind when the declaration was executed and that the execution was valid.²⁰ The fact that the individual signs a living will declaration will not be considered as an indication of a declarant's mental incompetency.²¹

Obviously excluded from making a living will declaration are those who are legally incompetent. The expanding common law and, in some states, legislation²² may provide some relief from those excluded individuals: infants,²³ adults who were never competent,²⁴ and formerly competent adults now incompetent.²⁵

B. Execution

Specific rules govern the execution of the living will declaration. The declaration must be signed and dated by the declarant or someone who at the declarant's express direction signs in the declarant's presence.²⁶ There must be two witnesses to the execution of the living will declaration, both of whom are at least eighteen years old and legally competent.²⁷ The witness may not be:

- (1) the person who signed the declaration on behalf of and at the direction of the declarant,
- (2) a parent, spouse, or child of the declarant;
- (3) entitled to any part of the declarant's estate whether the declarant dies testate or intestate, including whether the witness could take from the declarant's estate if the declarant's will is declared invalid; [a person is not considered to be entitled to any part of the declarant's estate solely by virtue of being nominated as a personal representative or the attorney of the estate in the declarant's will]; or

²⁰*Id.* § 16-8-11-15.

²¹*Id.*

²²*See, e.g.,* N.M. STAT. ANN. §§ 24-7-2 to -10 (1977).

²³*See, e.g., Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984) and *L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984).

²⁴*See, e.g., Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Storar*, 438 N.Y.2d 266, 420 N.E.2d 64 (1981).

²⁵*See, e.g., Foody*, 40 Conn. Supp. 127, 482 A.2d 713 (1984); *Severns*, 421 A.2d 1334 (Del. 1980); *Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); *Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

²⁶IND. CODE § 16-8-11-11(b) (Supp. 1985).

²⁷*Id.* Witnesses are required to sign in the presence of the testator and each other in the execution of a testamentary will. *See* IND. CODE § 29-1-5-3 (1982).

- (4) directly financially responsible for the declarant's medical care.²⁸

One problem not addressed in the above provisions may occur if a witness, who at the time of the execution of the living will declaration was a qualified witness, should later become unqualified. For example, a disinterested friend at the time of the execution of the living will declaration may later become a beneficiary under the declarant's will. The statute fails to address the question as to what time the qualifications for the witness must be met. Another problem may occur with living declarations executed before the effective date of September 1, 1985. The Act is silent with regard to the treatment of these prior declarations.

C. *The Form of the Declaration*

The executed declaration must be substantially in the form as set forth in the Act.²⁹ The Act allows the declaration to include additional specific directions regarding medical care with the declaration retaining its validity even if the additional specific directions are invalid.³⁰ This provides the declarant with important planning opportunities.

The declaration set out in the Act allows only for the withholding or withdrawal of life-prolonging procedures and specifically requires the provision of appropriate nutrition and hydration, the administration of medication, and the performance of any medical procedure necessary to provide the declarant with comfort care or to alleviate pain.³¹ The Act further defines life-prolonging procedures so as not to include these requirements.³² As a result, the scope of the living will declaration is narrower than relief provided under the common law which has sanctioned the removal of nutrition and hydration administered through painful and intrusive feeding tubes.³³

The declarant may wish to provide specific directions to the attending physician concerning the application of certain objectionable medical treatment, such as feeding tubes, respirators, or other similar devices which create great pain and discomfort to the living will declarant. There are many other medical procedures which the declarant may require to be

²⁸IND. CODE § 16-8-11-11(c) (Supp. 1985).

²⁹*Id.* § 16-8-11-12(a).

³⁰*Id.*

³¹*Id.* § 16-8-11-12(b).

³²*Id.* § 16-8-11-4.

³³See Lynn & Childress, *Must Patients Always Be Given Food and Water*, 13 HASTINGS CENTER REPORT 17 (1983); Wanzer, *The Physicians Responsibility Towards Hopelessly Ill Patients*, 310 NEW ENG. J. OF MEDICINE 955 (1984).

withheld, including surgery or cardiac resuscitation.³⁴

Even if the specific instructions are invalid, they will not invalidate the living will declaration.³⁵ Furthermore, it is specifically provided that the Act does not impair or supersede any legal right or legal responsibility that any person may have to effect the withholding or withdrawal of life-prolonging procedures in any lawful manner.³⁶ Even if not considered valid under the Living Will Act, the request could possibly be honored under common law principles concerning the patient's right to self-determination or under a constitutional right of privacy.³⁷

Another addition to the living will declaration could be the specific appointment of an attorney-in-fact by the declarant to make health care decisions for the declarant, including the withholding or withdrawing of certain medical treatment. Such an appointment is implicitly recognized in the Act, though the legal ramifications are not fully known at this time.³⁸ The appointment could also be made in a general durable power of attorney executed by the declarant.

D. Notification of Declarant's Attending Physician

An important aspect of the living will declaration is the notification of the declarant's "attending physician" of the existence of the declaration.³⁹ "Attending physician" is defined as the physician who "has the primary responsibility for the treatment and care of the patient."⁴⁰ Though no time is specified for the notification, the attending physician should probably be notified upon the execution of the living will declaration. The attending physician is required to make the declaration or a copy of the declaration a part of the declarant's medical records.⁴¹ A lawyer involved in the preparation of the living will declaration may wish to consider sending a copy of the declaration to the physician to make sure that this requirement is met.

E. Revocation

A living will declaration may be revoked by the declarant at any time by:

- (1) A signed, dated writing;

³⁴IND. CODE § 16-8-11-12(a) (Supp. 1985).

³⁵*Id.*

³⁶*Id.* § 16-8-11-18(e).

³⁷See *supra* notes 4 and 5 and accompanying text for cases where courts, acting solely within their discretion, allowed the removal of life-prolonging procedures.

³⁸See IND. CODE § 16-8-11-14(g) (Supp. 1985), requiring the attending physician to consult with such an agent if the physician believes that the declaration was executed invalidly.

³⁹See IND. CODE § 16-8-11-11(e) (Supp. 1985).

⁴⁰*Id.* § 16-8-11-2.

⁴¹*Id.* § 16-8-11-11(e).

(2) physical cancellation or destruction of the declaration by the declarant or another in the declarant's presence and at the declarant's direction; or

(3) an oral expression of intent to revoke.⁴²

Revocation is effective when communicated to the attending physician.⁴³ There is no legal liability imposed upon a person who fails to act on the revocation unless the person had actual knowledge of the revocation.⁴⁴

If a revocation is intended, all copies of the living will declaration should be gathered and destroyed and a similar document, signed and dated, should be sent to everyone in possession of the prior declaration. Although an oral expression of intent to revoke is expressly allowed, it is subject to the same difficulty of proof as are all other oral expressions.

F. Effect of Incompetency and Pregnancy

As will be discussed in more detail, the Living Will Act allows competent adults to control decisions relating to their own medical care, including the decision to have medical means to prolong their lives provided, withheld, or withdrawn.⁴⁵ The intent of the living will declaration is to cover those circumstances and problems which may arise if the declarant should later become incompetent and unable to direct the withdrawal or withholding of medical treatment. If the declarant is competent, there is no need for a living will declaration. One very important exception to the living will declaration arises when the declarant is pregnant. In that case, the declaration has no effect until the pregnancy is over.⁴⁶

G. Certification of Qualified Patient

If the declarant has executed a living will declaration in accordance with the Living Will Act and was of sound mind at the time of execution and the attending physician has diagnosed that patient as having a terminal condition and determined that the patient's death will occur from the terminal condition, whether or not life-prolonging procedures are used, the attending physician will immediately certify in writing that a person is a qualified patient.⁴⁷ The attending physician will include a

⁴²*Id.* § 16-8-11-13(a).

⁴³*Id.* § 16-8-11-13(b).

⁴⁴*Id.* § 16-8-11-13(c).

⁴⁵*See* § 16-8-11-1 (Supp. 1985).

⁴⁶*Id.* § 16-8-11-11(d).

⁴⁷*Id.* § 16-8-11-14(a).

copy of the certification in the patient's medical records.⁴⁸ Based on this certification, the physician or health care provider may legally withhold or withdraw life-prolonging procedures without being subject to criminal or civil liability, or to charges of unprofessional conduct.⁴⁹

It is presumed that the declarant was of sound mind at the time of execution in the absence of actual notice to the contrary.⁵⁰ Further, if the declarant is incompetent, at the time life-prolonging procedures are withdrawn, a valid execution of the living will declaration will be presumed.⁵¹ If evidence contrary to these presumptions surfaces, it is unclear who must make the determination that the declarant was of sound mind at the time of execution or that the declaration was validly executed. Because it is the attending physician who must certify in writing that the person is a qualified patient, it is presumably the attending physician's duty. While the presumptions may be reassuring, it is unclear what new liability may fall on the attending physician who decides these legal issues.

The attending physician must diagnose the declarant as having a "terminal condition," which is defined as a "condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty: (1) there can be no recovery; and (2) death will occur from the terminal condition within a short period of time without the provision of life-prolonging procedures."⁵² A key issue raised by this definition is whether death will occur from the terminal condition within a relatively short period. For example, Karen Ann Quinlan lived for another ten years upon the removal of life support systems other than nutrition and hydration. Literally applied, the Living Will Act may not cover a patient in a similar "vegetative state," because death may not occur within a short period of time.⁵³

The attending physician must also find that the patient's death will occur from the terminal condition whether or not life-prolonging pro-

⁴⁸*Id.* § 16-8-11-14(b).

⁴⁹*Id.* § 16-8-11-14(c).

⁵⁰*Id.* § 16-8-11-15.

⁵¹*Id.*

⁵²*Id.* § 16-8-11-9. (Related to the issue of determination of death is the Uniform Determination of Death Act, H.B. 1476, which was introduced into the Indiana Legislature in 1985, but not enacted. Indiana, presently, has no statutory definition of death.).

⁵³Karen Ann Quinlan was in a persistent vegetative state as a result of respiratory arrest in April, 1975. "Vegetative state" commonly means loss of cerebrum functioning, vision, hearing, taste, smell, voluntary movement, speech, memory, reasoning, judgment and intelligence, cerebellum functions, balance, posture, and coordination. It was also believed that Karen Ann Quinlan lost brain stem functions, such as voluntary breathing. Her parents requested removal of her respirator, but insisted that Karen receive nutrition and hydration. Karen Ann Quinlan lived for ten years after the removal of the respirator until her death in the summer of 1985.

cedures are used.⁵⁴ The apparent intent of this requirement is to preclude euthanasia. Certainly, some doctors may find it difficult to certify to a reasonable degree of medical certainty that there can be no recovery.

H. The Attending Physician's Options

The Living Will Act gives the attending physician many options ranging from the simple to the absurd. Confronted with a certified qualified patient, the attending physician is under no duty to withhold or withdraw any life-prolonging procedure.⁵⁵ However, the attending physician who refuses to withhold or withdraw life-prolonging procedures from a qualified patient must transfer the qualified patient to another physician who will honor the patient's living will declaration.⁵⁶ While this transfer to another physician appears mandatory, there are two exceptions.

The first exception occurs when, after reasonable investigation, the attending physician finds no other physician willing to honor the patient's declaration.⁵⁷ In that case, the attending physician may refuse to withhold or withdraw life-prolonging procedures and refuse to transfer the patient.⁵⁸ An obvious problem for the physician in this situation is in deciding what constitutes a reasonable investigation. Accordingly, all such efforts should be well documented.

The second exception is much more complex and of dubious value. Under the Act, the attending physician is not required to transfer a qualified patient to another physician if the attending physician has reason to believe the declaration was not validly executed. The physician may also refuse to transfer such a patient when evidence exists that the patient no longer intends for the original declaration to be enforced and the patient is presently unable to invalidate the declaration.⁵⁹ An attending physician wishing to avail himself of this second alternative must:

. . . attempt to ascertain the patient's intention and attempt to determine the validity of the declaration by consulting with any of the following individuals who are reasonably available, willing, and competent to act:

- (1) The judicially appointed guardian of the person of the patient if one has been appointed. This subdivision

⁵⁴IND. CODE § 16-8-11-14(a)(1)(B) (Supp. 1985).

⁵⁵*Id.* § 16-8-11-11(f).

⁵⁶*Id.* § 16-8-11-14(e).

⁵⁷*Id.* § 16-8-11-14(f).

⁵⁸*Id.*

⁵⁹*Id.* § 16-8-11-14(e).

shall not be construed to require the appointment of a guardian in order that a treatment decision can be made under this section.

(2) The person or persons designated by the patient in writing to make the treatment decision for the patient should the patient be diagnosed as suffering from a terminal condition.

(3) The patient's spouse.

(4) An adult child of the patient or, if the patient has more than one (1) adult child, by a majority of the children who are reasonably available for consultation.

(5) The parents of the patient.

(6) An adult sibling of the patient or, if the patient has more than one (1) adult sibling, by the majority of the siblings who are reasonably available for consultation.

(7) The patient's clergy or others with firsthand knowledge of the patient's intention.⁶⁰

An attending physician must list the names in the declarant's medical records of the individuals interviewed and the information received.⁶¹

If the information obtained indicates that the qualified patient intended to execute a valid living will declaration, the physician then may choose among two more options. The physician may either "withhold or withdraw the life-prolonging procedures, with the concurrence of one other physician, as documented in the patient's medical records; or request a court of competent jurisdiction to appoint a guardian for the patient to make the consent decision on behalf of the patient."⁶² The Act is silent as to what the attending physician should do if, from the information received, it is determined that the qualified patient did not intend to execute a valid living will declaration. Presumably, the attending physician would be under no obligation to transfer the qualified patient to a physician who would carry out the living will declaration.

IV. THE LIFE-PROLONGING DECLARATION

Indiana's Living Will Act is unique because it provides that a life-prolonging declaration may be executed requesting the use of life-prolonging procedures that would extend the declarant's life. In addition,

⁶⁰*Id.* § 16-8-11-14(g).

⁶¹*Id.* § 16-8-11-14(h).

⁶²*Id.* § 16-8-11-14(i)(1) and (2).

competent adults may also request that all possible life-prolonging procedures be taken. A physician is obligated to comply with that request.⁶³ These provisions were apparently included in the Act to secure passage of the Act in the Indiana Senate.⁶⁴ At this stage, it is difficult to anticipate how frequently this life-prolonging procedures declaration will be used.

Basically, the requirements for the life-prolonging procedures declaration are the same as those outlined above for the living will declaration with regard to competency, execution, form, delivery, revocation, and subsequent incompetence of the declarant.⁶⁵ However, it is unclear what duties such a declaration creates for the attending physician and health care facility given the ever expanding horizon of medical technology and the ability to prolong human life.

Though, on its face, a life-prolonging procedures declaration is nothing but a fair counterpart to a living will declaration, the living will declaration is aimed at a specific problem increasingly confronted by the courts, and it falls within a definite framework. The life-prolonging procedures declaration, on the other hand, is a solution in search of a problem and could possibly create many problems when applied. Such problems, should the procedure be widely used, could be the increased cost of medical care, the crowding of facilities, and the inestimable liability of health care providers who fail to use all possible life-prolonging procedures.

V. RIGHTS OF COMPETENT INDIVIDUALS

The Act goes beyond most living will legislation and specifically states that competent adults have the right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, withheld, or withdrawn.⁶⁶ At common law, a competent adult, under the doctrine of self-determination, had similar rights subject, however, to the interests of the state. These state interests include:

- (1) the prevention of suicide;
- (2) maintaining the ethical integrity of the medical profession;
- (3) the protection of the interest of innocent third parties; and

⁶³*Id.* § 16-8-11-11(g).

⁶⁴Senate opponents to the Act withdrew their opposition when the life-prolonging declaration language was included. See *Society for the Right to Die Newsletter* 4 (Spring 1985) (available in *Indiana Law Review Office*).

⁶⁵IND. CODE §§ 16-8-11-1 to -13 (Supp. 1985).

⁶⁶*Id.* at § 16-8-11-1.

(4) The preservation of life.⁶⁷

It is unclear whether this part of the Act is a restatement of the common law, or whether state interests are no longer a consideration. For example, the living will declaration of a pregnant individual has no effect until the pregnancy is over. However, no similar exemption is made under the Act for pregnant competent adults who expressly request removal of life-prolonging procedures. It would be unthinkable for the legislature to allow a competent individual to have medical treatment withheld if the individual was pregnant and the fetus could survive. Undoubtedly, such state interests must survive the statute.

VI. LEGAL RAMIFICATIONS

The Act specifically addresses certain legal ramifications of a living will declaration. A death caused by the withholding or withdrawal of life-prolonging procedures in accordance with the Act does not constitute a suicide.⁶⁸ The execution of a declaration does not affect the sale or issuance of any life insurance policy or modify the terms of a policy in force when the declaration is executed.⁶⁹ A policy of life insurance cannot be invalidated as a result of the withholding or withdrawal of life-prolonging procedures from an insured qualified patient, notwithstanding any term of the policy to the contrary.⁷⁰ A person may not require another person to execute a living will declaration as a condition for being insured or receiving health care services.⁷¹ The Act does not impair or supersede any legal right or legal responsibility that any person may have to effect the withholding or withdrawal of life-prolonging procedures in any lawful manner.⁷² The Act creates no presumption concerning the intent of a person who has not executed a living will declaration.⁷³

Further, any revocation of a living will declaration or a life-prolonging procedures declaration creates no presumption regarding the declarant's intentions in the event of a terminal condition.⁷⁴ Nothing in the act is to be construed to authorize euthanasia or to authorize any affirmative or deliberate act or omission to end life, other than to permit

⁶⁷Hodgmen and Frazer, *Withholding Life Support Treatment In Illinois-Part I*, 73 ILL. B.J. 107 (1984).

⁶⁸IND. CODE § 16-8-11-18(a) (Supp. 1985).

⁶⁹*Id.* § 16-8-11-18(b).

⁷⁰*Id.* § 16-8-11-18(c).

⁷¹*Id.* § 16-8-11-18(d).

⁷²*Id.* § 16-8-11-18(e).

⁷³*Id.* § 16-8-11-19.

⁷⁴*Id.* § 16-8-11-13(d).

the natural process of dying, including the withholding or withdrawing of life-prolonging procedures.⁷⁵ The use of the living will declaration is not to be construed as an intervening force to affect the chain of proximate cause.⁷⁶ Any physician or health care provider withholding medical or life-prolonging procedures in compliance with this Act will not be subject to any criminal or civil liability nor any charges of unprofessional conduct.⁷⁷

The Living Will Act does not specifically address some legal issues which could arise. For example, it is silent as to whether a physician, under the constraints of a living will declaration, may be held liable, civilly or criminally, for battery, if the physician refused to withhold the medical treatment and continues to insert tubes and invade the body of the declarant to provide such treatment.⁷⁸ The extent to which the physician must provide life prolonging procedures is also not addressed by the Act. Though technologically able to prolong life, should the physician be required to do so given the extremely high cost of medical facilities, services, and personnel assigned to keep an individual alive?

VII. PENALTIES

The Living Will Act authorizes various penalties in order to enforce compliance with the Act. A physician who knowingly violates the Act is subject to disciplinary sanctions under the Medical Licensing Board provisions.⁷⁹ A person who knowingly or intentionally destroys or cancels a living will declaration or forges a living will declaration commits a Class D felony.⁸⁰ A person who knowingly or intentionally forges a living will declaration with the intent to have life-prolonging procedures withheld or withdrawn or conceals a revocation commits a Class C felony.⁸¹ In addition, the Class C felon, if a beneficiary of the declarant, will be subject to the provision of the Probate Code which disinherits him and places his interest into a constructive trust as though he predeceased the declarant.⁸²

VIII. CONCLUSION

The opportunity of making either a living will declaration or life-prolonging declaration is provided by the Living Will Act and should

⁷⁵*Id.* § 16-8-11-20.

⁷⁶*Id.* § 16-8-11-21.

⁷⁷*Id.* § 16-8-11-14(d).

⁷⁸*See, e.g.,* Leach v. Shapiro, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984).

⁷⁹IND. CODE § 16-8-11-22 (Supp. 1985).

⁸⁰*Id.* § 16-8-11-16.

⁸¹*Id.* § 16-8-11-17.

⁸²*Id.* § 16-8-11-18(f) (citing IND. CODE § 29-1-2-12.1 (Supp. 1985)).

be considered by every individual. The key to understanding the Act is to recognize the well-defined and limited situations to which it applies. Where the Act does not apply, there is an expanding body of common law which may provide relief. Accordingly, individuals executing living will declarations should take the opportunity to include specific directions to the physician regarding abhorrent medical practices and appoint a trusted individual with power to make medical decisions for the individual.

In order to remove the courts from "right to die" questions, the Living Will Act places a substantial burden on physicians. Though not obligated to comply with the living will declaration, the physician nevertheless is given the duties of certifying qualified patients and searching for a physician who will comply unless other exceptions apply. The Act contains broad exoneration provisions; however, a physician or health care facility refusing to remove life supports may still face battery charges by a representative of the declarant.

As the technology of medicine advances, the Living Will and Life-Prolonging Procedures Act can only be the first step. In the future, Indiana must address the many other problems raised by life-prolonging procedures not covered by the Living Will Act.

Housing Code Violations and Tenant Remedies

WALTER W. KRIEGER*

I. INTRODUCTION

In 1985, the Indiana Court of Appeals used the illegal contract doctrine to declare a residential lease voidable where housing code violations existed.¹ This is a continuation of the trend of affording more protection to residential tenants. Along with the illegality doctrine, a tenant may be able to assert a breach of the warranty of habitability against the landlord. This Article examines and compares the illegal contract doctrine and the implied warranty of habitability as tenant remedies and notes their uses and limitations.

II. ILLEGAL CONTRACT DOCTRINE

A. *History Behind the Application*

Under the principle of freedom of contract, courts recognize that it is in the public interest to allow individuals broad powers to structure their own affairs by freely entering into legally enforceable agreements.² Occasionally, however, the courts will invoke the doctrine of illegality and refuse to enforce a contract because its terms violate positive law, offend public morality, or conflict with public policy.³ The doctrine of illegality applies to all contractual agreements, including real estate leases.⁴

Legislation is now the major source of public policy⁵ and the courts

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¹Noble v. Alis, 474 N.E.2d 109 (Ind. App. 1985). See *infra* notes 27-42 and accompanying text.

²A. FARNSWORTH, CONTRACTS § 5.1 (1982).

³6A A. CORBIN, CONTRACTS 1373-78 (1962); 14 S. WILLISTON, CONTRACTS 1628-30 (3d ed. 1972). The RESTATEMENT (SECOND) OF CONTRACTS (1981) objects to the use of the term "illegal" to describe the courts' refusal to enforce a contract on the grounds of public policy. RESTATEMENT (SECOND) OF CONTRACTS introductory note to chapter 8 (1981). The term "illegality" suggests that the contract itself is a crime when in fact there are many situations where no sanctions are provided for entering into an agreement which is against public policy. A. FARNSWORTH, CONTRACTS § 5.1 (1982).

⁴49 AM. JUR. 2D *Landlord and Tenant* § 41 (1970). For discussion of the application of the illegality doctrine to leases in general, see Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 470-81 (1972).

⁵RESTATEMENT (SECOND) OF CONTRACTS § 179 comment b (1981). The term legislation is used in its broadest sense to include state and federal statutes, local ordinances, and administrative regulations.

frequently remark that "a contract made in violation of a statute is void."⁶ This broad statement is not always true, however, for unless the statute expressly states that contracts made in violation of its provisions are void,⁷ the court will not automatically declare the contract unenforceable, but instead will attempt to balance the interest in the enforcement of the contract against the potential furtherance of the legislative policy by nonenforcement of the agreement.⁸ Sometimes the policy involved is so important or the conduct so serious that unenforceability is obvious. At other times the public interest is so trivial, the harm to the parties resulting from nonenforcement so great, and the conduct of the parties so free of serious moral turpitude that enforcement of the contract should clearly be allowed. In situations where the factors for and against enforcement are more evenly balanced, the court must examine these factors closely in reaching a decision.⁹

Housing codes¹⁰ existed as early as 1867,¹¹ but most housing codes are of very recent origin. In 1954, there were only fifty-six housing codes in force in the United States,¹² but by 1968, there were no fewer than 4,904 local housing codes and at least six state-wide housing codes.¹³

⁶See, e.g., *Sandage v. Studabaker Bros. Mfg.*, 142 Ind. 148, 156, 41 N.E. 380, 382 (1895); *Noble v. Alis*, 474 N.E.2d 109, 111 (Ind. Ct. App. 1985); *Maddox v. Yocum*, 109 Ind. App. 416, 422, 31 N.E.2d 652, 654 (1941).

⁷Occasionally a statute will provide that contracts made in violation of its provisions are null and void. In such cases the court is bound to carry out the legislative mandate. *RESTATEMENT (SECOND) OF CONTRACTS* § 178 comment a (1981). Statutes dealing with gambling and usury often state that contracts made in violation of the statutes are void. A. FARNSWORTH, *CONTRACTS* § 5.1 (1982).

⁸*RESTATEMENT (SECOND) OF CONTRACTS* § 178 (1981). For an example of the courts' use of this balancing test, see *Noble v. Alis*, 474 N.E.2d 109 (Ind. Ct. App. 1985).

⁹For a discussion of the factors which should be considered by the courts when approaching the question of the enforceability of a contract which violates public policy, see *RESTATEMENT (SECOND) OF CONTRACTS* §§ 178-99 (1981).

¹⁰The term "housing codes" refers to statutes or ordinances establishing minimum standards for rental units intended for human habitation. These codes regulate structure elements, facilities, services, and number of occupants. They are to be distinguished from building codes which only regulate structural elements. Building codes generally operate only prospectively on structures constructed or substantially altered after enactment of the code. Housing codes, on the other hand, are applied retroactively to all existing dwelling units from the date of their enactment. Because housing codes apply only to dwelling units, they do not apply to commercial units; building codes apply equally to residential and commercial units. See R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *LAW OF PROPERTY* § 6.37 (1984); Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 40-41 (1976).

¹¹Most scholars agree that the New York Tenement House Law of 1867, which applied only to multi-unit dwellings, was the first true housing code. For a brief discussion of the history of housing codes, see Abbott, *supra* note 10, at 40-45; Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 10-15 (1979).

¹²Abbott, *supra* note 10, at 44.

¹³R. CUNNINGHAM, W. STOEBUCK AND D. WHITMAN, *supra* note 10, at § 6.37 n.15,

This sudden increase in the number of housing codes can be explained by the enactment of the Housing Act of 1954.¹⁴ The Act required each municipality to have a federally approved "workable program" for community improvement as a prerequisite for the receipt of federal urban renewal funds and federal housing subsidies.¹⁵ The Housing and Home Finance Agency (HHFA), which administered the urban renewal program, made the enactment of housing codes a requirement for the approval of a "workable program."¹⁶ There can be little doubt that the desire to obtain federal funds was as much a factor in the sudden enactment of housing codes as was the concern for the plight of the slum tenant.

While housing codes were enacted to comply with the "workable program" requirement for federal funding, housing code enforcement was not a high priority, and as a result, the administrative agencies charged with enforcement were understaffed and underfunded.¹⁷ Many scholarly articles were highly critical of the ineffective administrative enforcement of housing codes.¹⁸ In addition, the traditional view of the courts was that housing codes were criminal in nature and did not create any civil remedy for the tenant or in any way affect the landlord-tenant relationship.¹⁹

During the late 1960's and early 1970's, the courts began to question the traditional doctrine of *caveat lessee*.²⁰ No doubt the enactment of

citing NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. No. 34, 91st Cong., 1st Sess. 276-77 (1968).

¹⁴12 U.S.C. §§ 1701-1750, 42 U.S.C. §§ 1407-1592 (1982).

¹⁵Housing Act of 1954, ch. 649, 303, 42 U.S.C. § 1451(c) (1982) (omitted, 42 U.S.C. § 5316 (1982)).

¹⁶Abbott, *supra* note 10, at 43. The housing code requirement was incorporated into the statute itself in 1964. Housing Act of 1964, ch. 301(a), 42 U.S.C. § 1451(c) (1982). The "working program" requirement was eliminated in 1969. Housing and Urban Development Act of 1969, ch. 217(a), 42 U.S.C. § 1451(c) (1982).

¹⁷LEVY, LEWIS AND MARTIN, CASES AND MATERIALS ON SOCIAL WELFARE AND THE INDIVIDUAL 1023-24 (1971).

¹⁸For a collection of the literature critical of housing code enforcement, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1094 n.2 (1971).

¹⁹See, e.g., *Fechtman v. Stover*, 139 Ind. App. 166, 199 N.E.2d 354 (1964).

²⁰The 1960's and early 1970's were a time of civil rights activism. Some have suggested that this activism found its way into the judicial system and may have contributed to the radical changes in the traditional law of landlord-tenant. See Krieger and Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 592-93 (1977); Rabin, *The Revolution in Traditional Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 546-49 (1984).

During the 1960's legal scholars wrote articles highly critical of the antiquated doctrine of caveat lessee. See, e.g., Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Grimes, *Caveat Lessee*, 2 VAL. L. REV. 189 (1968); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519 (1966); Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DEN. L.J. 387 (1967).

housing codes creating a duty to repair and maintain rental property seemed inconsistent with the old no repair rule of *caveat lessee*.²¹

*B. The Emergence of the Illegal Contract
Doctrine as a Tenant Remedy*

In 1968, the District of Columbia Court of Appeals, in *Brown v. Southall Realty Co.*,²² allowed the illegality doctrine as a defense to a landlord's action for possession for nonpayment of rent. The court found that substantial housing code violations existed at the inception of the lease and concluded that because a lease made in violation of the housing code was void, no rent was due and owing and the landlord was not entitled to possession based on nonpayment of rent.²³

While the District of Columbia housing regulations did not specifically state that where violations of the housing code existed, the lease was illegal, the housing regulations did provide that "no person shall rent or offer to rent any habitation . . . unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair and free from rodents or vermin."²⁴ In deciding whether to enforce the lease, the court examined the public policy issues involved and concluded that the intent of the legislature was to insure for the prospective tenant that rental units were and would continue to be habitable. To enforce a lease where violations of the housing code were known to exist at the time of the agreement would be to "flout" the purposes for which the regulations were enacted.²⁵ Finding that the housing regulations did "indeed 'imply a prohibition' so as to render the prohibited act void," the court reversed the lower court's decision that the landlord was entitled to possession based on the tenant's nonpayment of rent.²⁶ Because the tenant had in fact already vacated the premises, the court did not address the status of a tenant remaining in possession under an illegal contract; because the landlord was only claiming a right to rent due under the lease, the court did not discuss the right of the landlord to recover in quantum meruit for the benefit conferred upon the tenant from his possession.

²¹In *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court remarked, "In our judgment, the old no repair rule cannot coexist with the obligations imposed upon the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulation." *Id.* at 1076-77.

²²237 A.2d 834 (D.C. App. 1968).

²³*Id.* at 836-37. The tenant had in fact already vacated the premises because of their uninhabitable condition, but the tenant was forced to defend the action for possession based on the nonpayment of rent, or the default judgment would have established conclusively that rent was due in any subsequent suit by the landlord for rent. *Id.* at 835.

²⁴DISTRICT OF COLUMBIA HOUSING REGULATIONS § 2304 (cited at 237 A.2d at 836).

²⁵237 A.2d at 837.

²⁶*Id.*

During this Survey period, the First District Indiana Court of Appeals in *Noble v. Alis*²⁷ recognized the illegality defense in a suit by the landlord to recover rent. In *Alis* the tenants, Andrew Noble and Steward Odle, had leased an apartment in Bloomington, Indiana, from Linda Alis for a term of one year beginning August 16, 1983. Prior to returning to Bloomington, the tenants decided not to take possession of the premises and attempted to find a sublessee. While showing the apartment to a prospective sublessee on August 29th, the tenants discovered a number of defects in the apartment and contacted the City of Bloomington Housing Code Enforcement Officer, Ken Young, and requested an informal inspection of the premises.²⁸ Young had become aware of the residential use of the property on August 24th, and had sent a letter to A.B. Burnham, the legal title holder, requesting the property be registered as a residential rental unit as required by the Bloomington Housing Code.²⁹ When Young inspected the premises on September 1, 1983, he informed the tenants that the landlord did not have an occupancy permit, a violation of the Bloomington Housing Code. Further, Young advised that even if the property was registered, it would not pass an inspection.³⁰ Believing that they could not legally sublet the apartment, the tenants advised the landlord that they would no longer assume any responsibility for finding a sublessee.³¹

The apartment was subsequently rented to new tenants on September 15, 1983.³² The landlord eventually brought suit against Noble and Odle for rent and damages. The trial court awarded the landlord the sum of \$1,266.00 for rent and damages. The tenants appealed, asserting that the lease was void or voidable because the premises were neither registered as a residential rental unit nor had an occupancy permit as required by the housing code. The court of appeals agreed, reversing the damage award for rent and ordering the landlord to return the \$300.00 security deposit plus interest.³³ In recognizing the illegal contract defense to the action for rent, the court recited the general rule that "broadly speaking, the law is that a contract made in violation of a statute is void."³⁴

²⁷474 N.E.2d 109 (Ind. Ct. App. 1985).

²⁸*Id.* at 110.

²⁹From the facts it appears that Alis was the lessee of Burnham and that Alis had subleased a portion of the premises to Odle and Noble. Because the housing code required the owner to register the rental units, notice requesting that the property be registered as a rental unit was sent to Burnham.

³⁰474 N.E.2d at 110.

³¹*Id.*

³²*Id.* Though the property was rented on September 15, 1982, the property was not registered until October 4th, and was not inspected until October 17th, when eighty-three violations of the housing code were cited. An occupancy permit had still not been obtained at the time of the trial on January 26, 1984. *Id.* at 110-11.

³³*Id.* at 113.

³⁴*Id.* at 111.

Noting that the housing code did not expressly state that a contract in violation of its provisions was void and unenforceable, the court engaged in the balancing test discussed previously to determine whether to enforce the contract.³⁵ The court observed that where the provisions of an ordinance, such as the housing code's requirement of registration of rental units and issuance of an occupancy permit, are enacted under the city's police power for the protection of the public health, safety, and welfare, as opposed to those designed to raise revenues, courts are far more likely to deny the enforcement of an agreement in violation of such provisions.³⁶ In examining the registration and permit requirements, the court noted that until the unit is registered, the enforcement office is unaware of its existence and is unable to check for code compliance. Once it is registered, a temporary permit is issued, thus triggering an inspection by the Housing Department.³⁷ Thus, these administrative provisions clearly advanced the policies of public health, safety, and welfare.

In *Alis*, the court never found that the premises were actually "uninhabitable" as a result of the housing code violations. In fact, the tenants had raised the issue of a breach of an implied warranty of habitability at the trial, but the trial court did not find that the warranty was breached, and the tenants did not dispute this finding on appeal.³⁸ Several decisions from the District of Columbia Court of Appeals have indicated that in order for the illegality doctrine to apply, there must be serious violations of the housing code affecting health and safety.³⁹ One decision expressly held that failure to comply with registration and occupancy permit requirements would not render the lease void because these provisions did not affect the actual habitability of the premises.⁴⁰ Similarly, decisions from other jurisdictions considering housing code violations as possible breaches of the implied warranty of habitability have found that one or two minor code violations not affecting habitability might be considered "de minimus" and not a breach of the warranty.⁴¹ The *Alis* decision, however, concluded that the registration

³⁵*Id.* at 113. See *supra* notes 6-9 and accompanying text for a discussion of the factors considered in the balancing test.

³⁶*Id.* at 111. The Indiana court treated the registration and permit requirements as a "licensing" provision. When dealing with licensing requirements, courts distinguish between those designed only to obtain revenue and those designed to protect the health or safety of the public. See A. FARNSWORTH, *CONTRACTS* § 5.6 (1982). This would explain why the Indiana court reached a decision contrary to *Curry v. Dunbar House*, 362 A.2d 686 (D.C. App. 1976) which did not view the licensing and permit requirements as directly affecting health and safety.

³⁷474 N.E.2d at 112.

³⁸*Id.* at 113.

³⁹*E.g.*, *Reese v. Diamond Housing Corp.*, 259 A.2d 112 (D.C. App. 1969); *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. App. 1969).

⁴⁰*Curry v. Dunbar House*, 362 A.2d 686 (D.C. App. 1976).

⁴¹*E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert denied*, 400 U.S.

and occupancy permit requirements were an essential part of the enforcement process, indicating that their violation should not be considered "de minimus." The decision does not, however, suggest that *every* code violation, no matter how trivial, will trigger an illegal contract defense.

The second noteworthy aspect of the *Alis* decision is the narrow limitation the court placed on the use of the illegality doctrine. In allowing the tenants to plead the illegality defense, the *Alis* court indicated that an important factor was that the tenants had never taken possession of the apartment and thus never benefited in any way from the lease agreement.⁴² If the tenants had moved into the apartment and then discovered that it was not registered and that no occupancy permit had been issued, their remedy would rest on their ability to prove a breach of an implied warranty of habitability as in *Breezewood Management Co. v. Maltbie*.⁴³ This requirement that the tenant never benefit in any way from the lease agreement suggests the court would use an estoppel theory to prevent the tenant from raising the illegality defense once the tenant had taken possession. One might seriously question why a wrongdoer should be entitled to his unlawful bargain merely because the party for whom the statute was designed to protect partly performed the contract before he became aware of its illegality. Commentators have questioned the application of the estoppel theory in an illegal contract situation.⁴⁴ In raising the estoppel theory, the court seemed genuinely concerned that the tenant, after living in the apartment, might attempt to escape future rental payments as well as demand a refund on past payments.⁴⁵ This concern may be unjustified, however, if the court allows the landlord to recover the reasonable rental value of the apartment for the time the tenant is in actual possession.⁴⁶ While the tenant could recover past rental payments over and above the fair rental value of the premises, he would not escape all past rent obligations. As to future rental payments, the tenant would be forced to vacate the premises to avoid future liability for the fair rental value of the premises while in possession. If the courts are concerned that the tenant might use some "technical" code violation to void the lease, this could be avoided by use of a "de minimus" rule. A concern that a tenant might

925 (1970); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Folsy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973).

⁴²474 N.E.2d at 112.

⁴³*Id.* (citing *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980)).

⁴⁴17 AM. JUR. 2D *Contracts* § 173 (1964); A. FARNSWORTH, *CONTRACTS* § 5.1 (1982).

⁴⁵474 N.E.2d at 112. Perhaps the court did not believe the landlord could recover the fair rental value for the time the tenant was in actual possession. Perhaps also the court was concerned the tenant could use the illegality theory to terminate an unfavorable long-term lease.

⁴⁶For discussion of this issue, see *infra* notes 117-22 and accompanying text.

use code violations as a pretext to void an unwanted lease after living in the apartment for a long period of time with knowledge of the code violations could be handled on a case-by-case basis, rather than by a blanket prohibition against use of the illegality doctrine where the tenant has in any way benefited from the lease.⁴⁷

III. IMPLIED WARRANTY OF HABITABILITY AS AN ALTERNATIVE REMEDY

In *Alis*, the court's holding was based on the illegal contract doctrine, but the decision also indicates that a tenant may have to look to an implied warranty of habitability as a remedy for housing code violations where he has benefited from the illegal lease.⁴⁸ The opinion left open many questions concerning the rights of the tenant when he is asserting a breach of the warranty of habitability. Can the tenant recover damages for breach of the warranty for the entire period of time the housing code violations existed?⁴⁹ Has the tenant waived his right to treat the breach of warranty as a constructive eviction or a termination of the lease?⁵⁰ Does the landlord's breach "suspend" future obligations to pay

⁴⁷Although the District of Columbia allows the tenant to raise the illegal contract doctrine even after the tenant has taken possession of the premises, in *Watson v. Kotler*, 264 A.2d 141 (D.C. App. 1970), the court rejected the tenant's illegality defense to the landlord's suit for possession based on nonpayment of the rent where the tenant had remained in possession under the lease for two years before she claimed the lease was "void" after falling behind in her rental payments.

⁴⁸"In the latter case [where the tenants have received a benefit under the lease], the tenants' remedy rests on their ability to prove a breach of an implied warranty of habitability. . . ." 474 N.E.2d at 112.

⁴⁹It would appear that the tenant could sue for damages for the entire period of time the premises have been uninhabitable. Nevertheless, when the tenant does not inform the landlord of code violation and provide him with an opportunity to repair, it may be unfair to award damages for the entire period of uninhabitability. See *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973) ("As a prerequisite to maintaining such a suit [for recovery of a portion of rent paid while the premises were in an uninhabitable condition], the tenant must give the landlord positive and reasonable notice of the alleged defect, must request its correction and must allow the landlord a reasonable period of time to effect the repair or replacement."). *Id.*

In *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970), the court refused to allow a tenant to recover rent voluntarily paid to the landlord where the tenant had remained in possession for fifty-three weeks with full knowledge of the housing code violations.

⁵⁰If the tenant does not vacate the premises within a reasonable period of time after the breach of the warranty by the landlord, the court may find the tenant has "waived" this remedy. R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *supra* note 10, at §§ 6.33, 6.41. There may not, however, be any breach of the warranty until the landlord has been notified of the condition and given a reasonable time to repair. See, e.g., *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985); *Berzito v. Gambino* 63 N.J. 460, 308 A.2d 17 (1973); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979).

the agreed rent and can the tenant withhold the rent until the landlord complies with the housing code standards?⁵¹ The following discussion answers some of these questions.

A. *The Warranty in Indiana*

There are only three Indiana Court of Appeals opinions even acknowledging that an implied warranty of habitability in residential leases exists in Indiana,⁵² and the Indiana Supreme Court has not yet ruled directly on the issue.⁵³ Although many states have recently enacted comprehensive landlord-tenant codes imposing duties on the landlord to maintain rental dwellings in a habitable condition and providing remedies to the tenant for breach of this duty, no such modern landlord-tenant code has been enacted by the Indiana legislature.⁵⁴

*Breezewood Management Co. v. Maltbie*⁵⁵ is the first official Indiana Court of Appeals decision to recognize the implied warranty of habit-

⁵¹See *infra* notes 86-88 and accompanying text.

⁵²*Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982) (held no implied warranty of habitability in the rental of a single family dwelling by a landlord not in the business of leasing rental property); *Welborn v. Society for Propagation of Faith*, 411 N.E.2d 1267 (Ind. Ct. App. 1980) (assumed without deciding that an implied warranty of habitability existed, but concluded tenants had failed to prove damages for its breach); *Breezewood Management Company v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980) (recognized breach of an implied warranty of habitability where serious housing code violations existed in leased apartment and awarded damages).

⁵³The Indiana Supreme Court has recognized an implied warranty of habitability in the sale of a new home by a builder-vendor, *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972), and has extended the builder-vendor's warranty to a subsequent purchaser. *Barnes v. MacBrown and Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976). In *Theis v. Heuer*, the Indiana Supreme Court in a footnote acknowledged the development of a similar implied warranty of habitability in residential leases: "There is a parallel development in the law which is relevant but not necessary for our decision here. It is in the area of landlord-tenant. Modern case law is now finding an implied warranty of habitability by a landlord to his tenant." 264 Ind. at 11 n.1, 280 N.E.2d at 305 n.1.

⁵⁴The Indiana Legislature on four separate occasions from 1973-1977 rejected attempts to enact modified revisions of the Uniform Residential Landlord Tenant Act ("URLTA"). See *Krieger & Shurn*, *supra* note 20, at 641-43. No efforts appear to have been made since that time to enact a comprehensive landlord-tenant code. In an interesting turn of events, the city of Bloomington enacted the Uniform Residential Landlord Tenant Act as an ordinance. The Indiana Court of Appeals held the ordinance *ultra vires* because it attempted to regulate specific terms of the lease agreement totally unrelated to housing and safety codes. *City of Bloomington v. Chuckney*, 165 Ind. App. 177, 331 N.E.2d 780 (1975).

⁵⁵411 N.E.2d 670 (Ind. Ct. App. 1980). The first "reported" court of appeals decision to recognize an implied warranty of habitability in residential leases was *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976), *vacated*, 267 Ind. 176, 369 N.E.2d 404 (1977). This decision was never included in the official reports because the Indiana Supreme Court granted transfer and later, when the parties reached a settlement, dismissed the case without opinion. *Id.* The effect of the supreme court's action was to render the

ability in Indiana and is the only Indiana decision actually to award damages for its breach. In *Breezewood*, two students at Indiana University leased an apartment in Bloomington, Indiana, for a term of one year. Upon moving into the apartment they discovered over fifty housing code violations, eleven of which were "life-safety" violations—hazardous to the health of the occupant.⁵⁶ One student vacated the premises and the other remained in possession and paid a portion of the rent. At the end of the term the landlord brought suit for the unpaid rent and the tenants counterclaimed for breach of the implied warranty of habitability. The lower court denied the landlord's claim, awarded damages to the tenants on their counterclaim, and ordered a return of the tenants' security deposit.⁵⁷ In affirming the judgment, the court of appeals, noting the development of an implied warranty of habitability in the sale of a new house by a builder-vendor, concluded that "the seeds of the modern trend abolishing *caveat lessee* and treating a lease as a contractual relationship have been sown in Indiana."⁵⁸ The court also quoted extensively and with apparent approval from the landmark case of *Javins v. First National Realty Corporation*⁵⁹ and another leading decision, *Boston Housing Authority v. Hemingway*,⁶⁰ in support of an implied warranty of habitability in residential leases.

The *Breezewood* decision raises several interesting questions regarding the implied warranty of habitability. First, the decision seems to define "habitability" in terms of the local housing code standards and raises a serious question as to whether the warranty can exist without a local housing code. In discussing the warranty, the court concluded that housing code provisions in effect at the time of the lease are incorporated into the lease by law.⁶¹ However, where there are no local housing codes in effect, the court indicated that the parties might agree to rent the property "as is" under the doctrine of freedom of contract.⁶² While *Boston Housing Authority* does not seem to limit the implied warranty to situations in which there is a local housing code or to the standards set forth in the housing code,⁶³ the *ratio decidendi* in *Breezewood* was much

opinion of the court of appeals null and void. IND. R. APP. P. 11(b)(3). Thus, *Breezewood* is actually the first appellate court opinion to declare an implied warranty of habitability in residential leases in Indiana.

⁵⁶411 N.E.2d at 671.

⁵⁷*Id.* at 672.

⁵⁸*Id.* at 674.

⁵⁹428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

⁶⁰363 Mass. 184, 293 N.E.2d 831 (1973).

⁶¹411 N.E.2d at 675.

⁶²*Id.* at 675 n.2. While the language was contained only in a footnote, it was elevated into the body of the opinion by Judge Neal in *Zimmerman v. Moore*, 441 N.E.2d 690, 695 (Ind. Ct. App. 1982).

⁶³363 Mass. at 184, 293 N.E.2d at 831.

more narrowly stated: "For the reasons that a housing code was in effect and the premises violated many of its provisions, we hold that Breezewood breached an implied warranty of habitability."⁶⁴

B. Damages Under Breezewood's Implied Warranty of Habitability

The second issue regarding implied warranty raised in *Breezewood* is the measure of damages for breach of the warranty. While arguably not part of the decision itself, Judge Neal, author of the opinion, cited with apparent approval the standard contract measure of damages applied in *Boston Housing Authority* — the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their defective condition (hereinafter referred to as the first formula).⁶⁵ Likewise, the *Alis* opinion, also authored by Judge Neal, clearly indicates that the first formula is the proper measure of damages for breach of the warranty.⁶⁶ However, in *Welborn v. Society for Propagation of Faith*,⁶⁷ decided by the Indiana Court of Appeals Second District only one day after the *Breezewood* decision, Judge Shields noted that there is a split of authority as to the proper measure of damages for breach of the warranty.⁶⁸ She observed that, while some courts use the standard contract measure of damages (first formula), others use a different measure of damages — the difference between the rent agreed upon in the lease and the fair rental value of the premises in their present uninhabitable condition (hereinafter referred to as the second formula).⁶⁹ Because no damages were proven in the *Welborn* decision, the court did not indicate which of the two formulae it would use in the future.⁷⁰

While the measure of damages under the two formulae may appear to be only slightly different, this is not necessarily true. There may be no substantial difference where the agreed upon rent actually reflects the fair rental value of the premises as warranted. But if the parties actually contract to lease substandard housing with existing code violations, the agreed upon rent has no relation to the fair rental value of the premises as warranted. If the first formula is used by the court, the slum tenant will reap a windfall because the parties never contracted to rent a habitable dwelling, and there has been no actual loss of bargain

⁶⁴411 N.E.2d at 675.

⁶⁵*Id.*

⁶⁶474 N.E.2d at 112.

⁶⁷411 N.E.2d 1267 (Ind. Ct. App. 1980).

⁶⁸*Id.* at 1270 n.5.

⁶⁹*Id.* at 1271.

⁷⁰*Id.*

to the tenant.⁷¹ Under the second formula, however, there would be little or no damages since the agreed upon rent would be the same as the fair rental value of the premises in their present condition.⁷² This might be more consistent with the expectations of the parties, but it would provide little incentive for the landlord to comply with the provisions of a housing code. Both formulae, however, cause difficulty and expense in proving actual damages, i.e., the fair rental value of the premises as warranted and the fair rental value of the premises in their present condition. This has led a number of courts to adopt yet another formula — the percentage diminution measure of damages. The rent is abated by a percentage amount equal to the percentage reduction in use and enjoyment which the trier of fact determines to have been caused by the defects (hereinafter referred to as the third formula).⁷³ The third formula seems to be the most equitable way to determine damages. It guarantees some rent to the landlord since it uses the agreed rent as the starting point, while at the same time providing some relief to the tenant by abating the rent based on the decreased use and enjoyment caused by the defective conditions.

The difficulties that can be encountered in assessing damages are indicated by the facts of the *Welborn* case. A family evicted by their landlord was allowed to rent half of a furnished double, including utilities, for fifty-five dollars a month from the Society for the Propagation of the Faith. During a four-month period, the utilities on the double amounted to \$499.72.⁷⁴ While the decision does not indicate which formula the court used, the court found that "the record is devoid of any evidence that the fair rental value of the premises was less than the actual amount for which the premises were rented."⁷⁵ If evidence had been introduced as to the fair rental value of half a furnished double complying with code standards, damages based on the first formula might have proven ruinous to the landlord, especially one apparently not motivated by profit. On the other hand, if the court had used the second formula, it is unlikely any damages could have been proven. While the facts in the *Welborn* case might suggest the use

⁷¹Several commentators have suggested that the use of the first formula might result in damages greater than the agreed upon rent, i.e., the landlord would have to pay the tenant to live in the uninhabitable dwelling. Abbot, *supra* note 10, at 21; Cunningham, *supra* note 11, at 106; Krieger & Shurn, *supra* note 20, at 616-17; Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 524-25 (1984).

⁷²Abbot, *supra* note 10, at 21; Cunningham, *supra* note 11, at 106.

⁷³E.g., *Green v. Superior Court*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); *McKenna v. Begin*, 5 Mass. App. 304, 362 N.E.2d 548 (1977). For a general discussion of the percentage diminution theory, see Abbott, *supra* note 10, at 22-24; *Academy Spires, Inc. v. Grown*, 111 N.J. Super. 477, 268 A.2d 556 (1970).

⁷⁴411 N.E.2d at 1268-69.

⁷⁵*Id.* at 1271.

of the third formula, the language in the *Welborn* decision that "the trial court was not at liberty to speculate, guess, or surmise as to the value of the injury"⁷⁶ may present some problems should the lower court attempt to use the percentage diminution approach.

C. *The Problem with Dependent Covenants*

Another interesting aspect of the implied warranty touched upon in the *Breezewood* decision is the contract doctrine of dependent covenants. At common law, the covenants in a lease were independent of each other, and a breach of a covenant by the landlord in no way affected the duty of the tenant to pay the full amount of the rent in the lease.⁷⁷ If the tenant refused to pay the rent, the landlord could evict the tenant under the summary dispossession statutes enacted in most states, and the landlord's breach of a covenant in the lease would be no defense to the tenant's nonpayment of the rent. Most of the recent decisions recognizing an implied warranty of habitability in residential leases have indicated, however, that the warranty and the covenant to pay rent are dependent and that the breach of the warranty by the landlord suspends the tenant's obligation to pay rent.⁷⁸ This may become a critical issue where the tenant withholds all or a portion of the rent and the landlord brings an action to evict the tenant for nonpayment of the rent.⁷⁹

The *Breezewood* decision appears to recognize that the implied warranty of habitability and the tenant's covenant to pay rent are dependent. The opinion quotes with apparent approval from *Boston Housing Authority v. Hemingway* that "the landlord's breach of its implied warranty of habitability constitutes a total or partial defense to the landlord's claim for rent being withheld, depending on the extent of the breach."⁸⁰ In the same part of the *Breezewood* opinion, in responding to the landlord's claim that *Javins* suspends the tenant's obligation to pay rent but that no damages are recoverable by the tenant, Judge Neal noted that *Javins* did not address the tenant's right to recover damages, but instead stated that a "landlord's breach may suspend or extinguish a rental obligation and thereby cause the lessor's action against the tenants for nonpayment of rent to fail."⁸¹ There is nothing in the *Breezewood* opinion to suggest

⁷⁶*Id.* at 1270.

⁷⁷*E.g.*, *Magee v. Indiana Business College*, 89 Ind. App. 640, 166 N.E. 607 (1929); *Bryan v. Fisher*, 3 Blackf. 316 (1833).

⁷⁸*E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

⁷⁹See *infra* notes 86-88 and accompanying text.

⁸⁰411 N.E.2d at 675 (quoting *Boston Housing Authority v. Hemingway*, 363 Mass. at 203, 293 N.E.2d at 845).

⁸¹411 N.E.2d at 675.

that the court disagreed with the *Javins* decision. It may seem surprising, therefore, that in the *Alis* opinion, Judge Neal, after expressing his concern that the tenant might try to demand a refund on past rental payments and avoid future rental payments under an illegal contract defense, would cite *Breezewood* in support of the position that "such a breach does not, however, suspend a tenant's obligation to pay rent and allow no damages recoverable to the landlord."⁸² It is doubtful that Judge Neal ever intended these words as a commentary on the doctrine of dependent covenants. The sentence contains two unrelated thoughts — the tenant's obligation to pay "rent" and the landlord's right to recover "damages" for the tenant's use and enjoyment of the premises. It would appear that Judge Neal was simply indicating that the tenant could not live in the apartment "rent free" merely because the landlord had breached an implied warranty of habitability. Following this remark, he discussed the proper measure of damages for breach of the warranty and finally stated, "[I]n other words, tenants were obligated to pay the actual rental value of the apartment inasmuch as they derived some benefit from the rental arrangement."⁸³ From the context in which the words were used, Judge Neal was discussing damages for breach of the warranty and was not suggesting that the duty to pay rent and the warranty of habitability are independent covenants.⁸⁴

The *Welborn* decision also addressed the dependency of covenants issue. In dictum, Judge Shields noted, "[A]rguably Indiana does treat leases as ordinary contracts containing dependent covenants."⁸⁵

It should be noted, however, that finding the warranty of habitability and the covenant to pay rent dependent does not totally resolve the issue of rent withholding. In many jurisdictions, the summary dispossession statute is limited to the single issue of whether rent is due and owing.⁸⁶ If the finder of fact should ultimately determine that some rent is still due and owing, there is no logical reason why the court could not grant the landlord's judgment for possession.⁸⁷ Nevertheless, the vast

⁸²474 N.E.2d at 112.

⁸³*Id.*

⁸⁴When the court speaks *obiter dictum*, these casual remarks may easily be misinterpreted when taken out of context and applied to an issue which was not under consideration by the court. Cf. *Stoller v. Doyle*, 257 Ill. 369, 100 N.E. 959 (1913).

⁸⁵411 N.E.2d at 1269 n.4. While not cited by the court, it is suggested that the case of *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 137 Ind. App. 599, 210 N.E.2d 385 (1965) also supports the doctrine of dependent covenants.

⁸⁶For an interesting discussion of the problems caused by the procedural limitations of the summary dispossession statutes, see Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L. REV. 1385 (1978-79).

⁸⁷Despite Illinois' recognition that the covenants in the lease are dependent, empirical evidence indicates that in the Chicago area, the courts are awarding the landlord possession if any rent is found due and owing after deducting the damages for the landlord's breach

majority of jurisdictions, by case law or legislation, have allowed the tenant this right of self-help rent withholding. When it is later determined by the court how much rent is due after deducting damages for breach of the warranty, the tenant is given a reasonable period of time to pay this amount to the landlord.⁸⁸ In spite of the cited authority supporting the view that covenants in a lease are dependent, the issue of rent withholding is still an open question in Indiana, and it would not be advisable for the tenant to use this remedy until it is recognized by the courts or until the legislature enacts a rent withholding statute.

D. Limitations on the Warranty of Habitability

The few Indiana decisions discussing the implied warranty of habitability have all involved residential leases. While there has been no discussion of the warranty in regard to commercial or agricultural leases, it is very unlikely that the Indiana courts would extend the implied warranty to cover such situations. Most courts considering the issue have refused to extend the warranty of habitability beyond residential leases.⁸⁹ *Breezewood* and *Welborn* did not, however, indicate any limitation on the type of residential property involved. In *Zimmerman v. Moore*,⁹⁰ the First District Indiana Court of Appeals, in an opinion also written by Judge Neal, placed a major limitation on the use of the implied warranty of habitability. In *Zimmerman*, the tenant was injured by

of his implied warranty of habitability. R. CUNNINGHAM, W. STOEBCUK & D. WHITMAN, *supra* note 10, at § 6.43. Also, in *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973), the court held that while the warranty and the covenant to pay rent were interdependent, the tenant could be evicted for withholding rent unless he complied with the statutory rent withholding procedure. *Id.* at 202, 293 N.E.2d at 845.

⁸⁸*E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Pugh v. Holmes*, 486 Pa.2d 272, 405 A.2d 897 (1979); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

Much of the recently enacted landlord-tenant legislation contains provisions authorizing rent withholding under certain circumstances. For a discussion of the rent withholding provision, see Cunningham, *supra* note 11. Because the right to withhold rent would depend upon whether the landlord had breached the warranty of habitability, this would require a trial on the merits and would in most jurisdictions change the summary nature of the landlord's dispossessory action based on nonpayment of rent. Several cases have suggested that the court might issue a protective order requiring the tenant to pay the rent into the court to ensure funds will be available should the landlord prevail. *E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071, 1083 n.67 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

⁸⁹*See infra* note 128.

⁹⁰441 N.E.2d 690 (Ind. Ct. App. 1982).

falling down the back steps of a single family dwelling leased from a non-merchant landlord. The landlord had acquired the house, her former home, by virtue of a divorce settlement with her prior husband, and had decided to rent the house after she moved into her new husband's home. There was evidence that the design of the steps violated provisions of the One and Two Family Dwelling Code.⁹¹ The back steps had been poorly designed and there was no landing. The back door swung out over the steps, and there was a railing on only one side of the stairway. In reversing the lower court judgment for the tenant, the court of appeals held that the instruction on breach of an implied warranty of habitability was erroneous.⁹² The court distinguished *Breezewood* on the ground that it involved an old converted home with four apartments in one building (which apparently made the landlord in the business of leasing apartments).⁹³ The court also noted that cases from other jurisdictions relied upon by the tenants (such as *Javins* and *Boston Housing Authority*) involved "large city apartment complexes operated and owned by professional landlords who were in the business of real estate development and ownership."⁹⁴ The court declined to extend an implied warranty of habitability to the rental of a single family, used dwelling,⁹⁵ effectively removing all used, single family dwellings from the coverage of the implied warranty of habitability. On the other hand, the court's emphasis on the fact that the landlord was not a merchant⁹⁶ and the extensive discussion of why liability under warranty or strict liability in tort should not be extended to a non-merchant⁹⁷ suggests that the court might

⁹¹*Id.* at 692.

⁹²*Id.* at 696.

⁹³*Id.* at 695-96.

⁹⁴*Id.* at 695.

⁹⁵*Id.* at 696.

⁹⁶For example, the sentence immediately preceding the sentence exempting used, single-family dwellings states: "Both philosophical underpinnings [superior knowledge and expertise of the merchant and the ability to spread the risk throughout the industry where the sale is by a merchant] are absent in our case of a non-merchant lessor who casually rents a single family dwelling in Greencastle, Indiana." 411 N.E.2d at 696.

⁹⁷The court indicates that the two principal philosophical justifications for imposing strict liability upon a merchant or manufacturer under an implied warranty or section 402A of the RESTATEMENT (SECOND) OF TORTS are that the merchant or manufacturer has superior expertise and knowledge and that the manufacturer can spread the risk throughout the industry. 411 N.E.2d at 695-96. Both the Uniform Commercial Code and the RESTATEMENT (SECOND) OF TORTS limit strict tort liability to sales by merchants. *Id.* One commentator notes, however, that most of the cases rejecting the landlord's traditional immunity from tort liability for injuries to a tenant or his guest caused by defective conditions of the leased premises have not imposed "strict liability" standards. Instead, the courts have held the landlord liable only where he has been found to be negligent based on notice of the condition and an opportunity to repair. Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637, 650-53 (1984). The *Zimmerman* court seemed to assume that if the warranty of habitability were found to apply, then strict liability

have intended to exempt single family dwellings from the warranty only where the landlord is not a merchant.⁹⁸ Similarly, the rationale for not extending the warranty to the casual landlord not in the business of leasing rental units would seem to apply equally where the landlord leases one or two apartments in the house in which he resides.⁹⁹ Whether the *Zimmerman* holding will be extended to cover this situation is unsettled.

IV. COMPARISONS BETWEEN THE ILLEGAL CONTRACT DOCTRINE AND THE IMPLIED WARRANTY OF HABITABILITY

The illegality doctrine recognized in the *Brown* decision was viewed as an important new tenant remedy by many of the legal commentators of the day.¹⁰⁰ The doctrine, however, has not been widely used outside the District of Columbia.¹⁰¹ The obvious reason was the almost simul-

would follow. This would not be true unless the court chose to do so rather than apply a negligence standard for breach of the warranty. 411 N.E.2d at 695-96.

⁹⁸Others have also found the holding in the *Zimmerman* case to be unclear: "It may stand for the proposition that the implied warranty of habitability is inapplicable to rentals of all single family dwellings . . . or to rentals of single family houses by non-merchants." Mallor, *supra* note 97, at 660-61.

⁹⁹Of the states which have recently enacted modern landlord-tenant codes imposing a duty to repair on the landlord, several states have exempted non-merchant landlords. See *supra* note 97. Although the statute specifically exempts owner-occupied two or three family dwellings from the statutory warranty, a non-merchant landlord was held liable for injury under a judicially-imposed warranty. *Crowell v. McCaffrey*, 377 Mass. 443, 386 N.E.2d 1256 (1979).

¹⁰⁰E.g., Note, *Tenants' Rights in the District of Columbia: New Hope for Reform*, 19 CATH. L. REV. 80 (1968); Note, *Leases and The Illegal Contract Theory - Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920 (1968); Note, *Housing Violations Void Lease - A New Tenant Remedy*, 25 WASH. & LEE L. REV. 335 (1968). Most of the commentators, however, also noted limitations of this remedy such as the ability of the landlord to evict the tenant immediately once the tenant had successfully raised the illegality defense in an action for rent.

¹⁰¹In the District of Columbia, residential tenants have made extensive use of the illegal contract doctrine as an alternative to the implied warranty of habitability remedy. Cunningham, *supra* note 11, at 80-81. In 1970, the illegality defense was included in the District of Columbia Landlord-Tenant Regulations. DISTRICT OF COLUMBIA LANDLORD-TENANT REGULATIONS § 2902.1 (1970).

Outside the District of Columbia, there are only a handful of cases suggesting the use of the illegality doctrine as a defense to an action for rent where housing code violations existed at the inception of a residential lease. *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Longenecker v. Hardin*, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970); *Noble v. Alis*, 474 N.E.2d 109 (Ind. Ct. App. 1985); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Ohio Mun. 1972); *Riley v. Nelson*, 256 S.C. 545, 183 S.E.2d 328 (1971).

At least one jurisdiction has refused to hold the lease void because of housing code violations, suggesting that housing codes should be administratively enforced and not enforced through the courts by tenants using civil remedies. *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

taneous recognition of an implied warranty of habitability in residential leases.¹⁰² The implied warranty of habitability theory provided the tenant with an entire new range of effective contractual remedies.¹⁰³ In the context of residential leases, the implied warranty of habitability is in most circumstances the superior tenant remedy.¹⁰⁴ Nevertheless, the illegal contract doctrine may still prove a useful tenant remedy.

One of the major difficulties with the illegal contract theory from the tenant's viewpoint is the tenant's status once the court declares the contract illegal. Although *Brown* did not address this issue, it is generally agreed that because the landlord placed the tenant into possession, the tenant would not be considered a trespasser.¹⁰⁵ At common law, a tenant under a void lease normally becomes a tenant at will.¹⁰⁶ In *Diamond Housing Corp. v. Robinson*,¹⁰⁷ however, the District of Columbia Court of Appeals held that, under the District of Columbia statutes, a tenancy at will can only be created by an express contract, and therefore the tenant became a statutory tenant at sufferance which was in the nature of a tenancy from month to month requiring thirty days notice to quit.¹⁰⁸

¹⁰²In the landmark decision of *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), the court found that "the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover." *Id.* at 1082. *Javins* was not the first decision to recognize an implied warranty of habitability in residential leases. See, e.g., *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *Javins*, however, gained national attention and is cited in nearly every subsequent decision recognizing an implied warranty of habitability in a residential lease. There is an impressive body of literature on the subject. See, e.g., Abbott, *supra* note 10; Cunningham, *supra* note 11; R. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* §§ 3:10-3:45 (1980).

¹⁰³For a discussion of the contractual remedies available to the tenant under the implied warranty of habitability theory, see Cunningham, *supra* note 11, at 98-126; Krieger & Shurn, *supra* note 20, at 612-25; R. SCHOSHINSKI, *supra* note 102, at §§ 3:19-3:25.

¹⁰⁴"The illegality defense innovated in *Brown v. Southall* has won few adherents outside the District of Columbia, doubtless because of its intrinsic limitations and the comparative attractiveness of an alternative theory—the implied warranty of habitability." P. GOLDSTEIN, *REAL PROPERTY* 940 (1984).

Most cases and commentators have not bothered to state the obvious. Nevertheless, the small number of decisions outside the District of Columbia using the illegal contract doctrine as a tenant remedy and the wide use of the alternative implied warranty of habitability theory suggest that attorneys and juries have chosen the latter as the more attractive tenant remedy.

¹⁰⁵*Diamond Housing Corporation v. Robinson*, 257 A.2d 492, 495 (D.C. App. 1969).

¹⁰⁶*Id.*; see also *King v. Moorehead*, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973).

¹⁰⁷257 A.2d 492 (D.C. App. 1969).

¹⁰⁸*Id.* at 495. Indiana has a statute similar to the District of Columbia statute which provides that a tenancy at will can only be created by express agreement. IND. CODE § 32-7-1-2 (1982). Indiana, however, would not require a notice to quit to terminate a tenancy at sufferance. IND. CODE § 32-7-1-7 (1982). The entire question is probably moot in Indiana, however, because *Noble v. Alis*, 474 N.E.2d 109 (Ind. App. 1985), discussed *supra*, held

Whether the tenant is viewed as a tenant at will or a tenant at sufferance, however, the tenant will lose any benefits under the void lease and could be evicted immediately, or in some jurisdictions, upon giving the tenant the statutory notice to quit (usually thirty days).¹⁰⁹

Where there is a shortage of decent housing or where the tenant has made a good bargain, he may not wish to terminate the lease under an illegal contract theory, but instead may wish to remain in possession under the lease and exert pressure on the landlord to comply with local housing code provisions. This is possible under the implied warranty of habitability theory.¹¹⁰ Of course, if the tenant wishes to terminate the

that the illegal contract defense is unavailable where the tenant has benefited from the lease by taking possession.

¹⁰⁹One serious problem may still confront the landlord when he attempts to evict a tenant after the tenant has reported housing code violations to the proper authorities or has successfully pleaded an illegality defense or an implied warranty of habitability defense in a prior suit for possession based on the nonpayment of rent. In such a case the tenant may well claim that the eviction is in retaliation for the tenant's exercise of his legal rights. A classic — perhaps gothic — example of the problems that could await the landlord is set forth in *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1973), the culmination of a series of legal actions filed by the landlord in an attempt to evict a tenant under an illegal lease. The landlord attempted to evict Mrs. Robinson for nonpayment of rent. She successfully argued that *Brown v. Southall Realty* (the illegal contract defense) prohibited the landlord from collecting accrued rent. The landlord filed a second action to evict her as a trespasser, only to discover that she was a tenant at sufferance. After giving her the required thirty days' notice, he once again attempted to evict her, only to be met with a retaliatory eviction defense. The lower court allowed the eviction, and on appeal to the District of Columbia Court of Appeals, the judgment for possession was affirmed. However, on appeal to the federal court of appeals, the judgment was reversed. The court noted that there had been a sudden rise in actions for possession based on notice to quit following closely behind successful *Javins* (implied warranty) and *Southall Realty* (illegality) defenses in actions for possession based on nonpayment of rent. To allow the landlord to evict the tenant in such a case would be to vitiate the tenant's legal rights recognized in *Javins* and *Southall Realty*. Thus the court concluded that the landlord could not evict Mrs. Robinson as long as his motive was to rid himself of the tenant because she was not paying rent. The court, however, suggested it was not "till death do them part," for Diamond could repair the premises, or if unable or unwilling to do so, could simply remove the property from the housing market. *Id.* The dissent felt this Draconian treatment of the landlord would discourage investment in rental housing. *Id.* at 872 (Robb, J., dissenting).

¹¹⁰In many of the implied warranty of habitability cases, the tenant chose to remain in possession and either repair the defective condition and deduct the cost of repair from the rent or withhold the rent until the landlord had made the necessary repairs. *E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985), *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 256 (1970); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979).

Several decisions recognizing both the illegal contract and implied warranty of habitability defenses have indicated that the two theories are inconsistent and that the illegal contract theory is appropriate only where the tenant wishes to terminate the lease. If the tenant wishes to remain in possession under the lease, he must elect to pursue the implied

lease because of the landlord's breach of the implied warranty of habitability, he can treat the breach as a common law constructive eviction¹¹¹ or use the contract remedy of rescission.¹¹²

Superficially, the illegal contract doctrine may appear to be very advantageous to one or the other of the parties. If the tenant has paid the agreed upon rent under the lease despite housing code violations, under the general principle of law that the courts will leave the parties to an illegal contract where it finds them, it would appear the tenant could not recover any past rental payments under the illegal contract.¹¹³ The courts, however, have adopted a more equitable approach to the problem. Where the tenant is attempting to recover rent already paid to the landlord, the courts have applied two generally recognized exceptions to the rule that the law will leave the parties to an illegal

warranty of habitability theory. *Cooks v. Fowler*, 459 F.2d 1269 (D.C. Cir. 1971); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

¹¹¹At common law, if the landlord substantially interfered with the tenant's use and enjoyment of the premises, the tenant could treat the landlord's breach of the covenant of quiet enjoyment as a constructive eviction and vacate the premises. A constructive eviction terminates the lease and the tenant's obligation to pay rent. *Lafayette Realty Corp. v. Vonnegut's Inc.*, 458 N.E.2d 689 (Ind. Ct. App. 1984). There were two important requirements before the court would treat the landlord's breach as a constructive eviction: the landlord's breach must have been substantial, and the tenant must have vacated the premises within a reasonable time. *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1981). For a discussion of the doctrine of constructive eviction, see R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *supra* note 10, at § 6.33. In several of the early cases recognizing the warranty of habitability, the tenants used the remedy of constructive eviction and terminated the lease. *Marini v. Ireland* 56 N.J. 130, 265 A.2d 526 (1970); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Caveat: Most courts which have recognized a warranty of habitability in residential leases have also indicated that before there can be a breach of the warranty, the landlord must be notified of the defective condition and given a reasonable time to repair. *E.g.*, *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979). Thus it would appear that the tenant could not treat the conditions as a constructive eviction until this requirement has been met. See RESTATEMENT (SECOND) OF PROPERTY § 10.1 (1977).

¹¹²Several of the decisions have used the contract term "rescission" to describe the tenant's right to terminate the lease where the landlord has breached the implied warranty of habitability. *E.g.*, *Lemle v. Breedon*, 51 Hawaii 426, 462 P.2d 470 (1969); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971). It is not clear if the court will still require the tenant to vacate within a "reasonable time" under a contract theory as is required under the property concept of constructive eviction. For discussion of this point, see R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *supra* note 10, at § 6.41 (1984).

As discussed at *supra* note 111, the tenant may be required to notify the landlord and give him a reasonable opportunity to correct the defect before he can terminate the lease. RESTATEMENT (SECOND) OF PROPERTY § 10.1 (1977).

¹¹³J. CALAMARI & J. PERILLO, *CONTRACTS* (2d ed. 1977).

contract where it finds them: (1) The court will not deny recovery of monies already paid where the parties are not in *pari delicto* because of an unequal bargaining position; and (2) the court will not refuse assistance where the statute in question was enacted for the protection of the party seeking recovery of monies paid pursuant to the illegal contract.¹¹⁴

If, on the other hand, the tenant has remained in possession but has refused to pay rent, it might appear under the *Brown* decision that the landlord is without any remedy because he cannot recover past due rent under the illegal lease.¹¹⁵ However, the *Brown* decision did not address the landlord's right to recover in quantum meruit for the benefit received by the tenant from his possession. When the issue was raised in subsequent decisions, the courts held that the landlord was entitled to recover the reasonable rental value of the premises for the period of time the tenant was in actual possession.¹¹⁶ In *William J. Davis, Inc. v. Slade*,¹¹⁷ the District of Columbia Court of Appeals, relying in part on *Diamond Housing Corp. v. Robinson*,¹¹⁸ allowed the landlord to recover in quantum meruit on the theory that, while the lease itself was void and unenforceable, a tenancy at sufferance was created and thus the tenant became liable for the reasonable rental value of his possession.¹¹⁹ The court in *King v. Moorehead*¹²⁰ based its decision upon a much more practical rationale: "We prefer to base our decision openly on the hard reality that if, under existing conditions, the landlords were deprived of all rights because of noncompliance with housing codes there would be far fewer low income housing units available—landlords would find it to their economic advantage to abandon their properties rather than spend their separate resources to restore them to habitability."¹²¹ If the

¹¹⁴*William J. Davis, Inc. v. Slade*, 271 A.2d 412 (D.C. App. 1970) (tenant may not be *in pari delicto* because of disparity in bargaining position, but even if both parties are *in pari delicto*, on occasion, public policy would be better served by rescission); *Glyco v. Schultz*, 35 Ohio Misc. 2d 25, 289 N.E.2d 919 (Ohio Mun. 1972) (court will not apply *in pari delicto* rule where statute in question is for protection of one of the parties and where that party had no real choice but to acquiesce in the illegality).

¹¹⁵237 A.2d at 837. Denying the landlord possession for nonpayment of rent was in effect a finding that no rent was due and owing. Several other decisions have also indicated that the landlord is not entitled to the rent under the illegal lease. *E.g.*, *Wm. J. Davis Inc. v. Slade*, 271 A.2d 412 (D.C. App. 1970); *Diamond Housing v. Robinson*, 257 A.2d 492 (D.C. App. 1969), *motion denied*, 433 F.2d 497 (1970).

¹¹⁶See *infra* notes 117-18 and 120.

¹¹⁷271 A.2d 412 (D.C. App. 1970).

¹¹⁸257 A.2d 492. See discussion *supra* notes 107-09 and accompanying text.

¹¹⁹271 A.2d at 416.

¹²⁰495 S.W.2d 65 (Mo. Ct. App. 1973).

¹²¹*Id.* at 79; see also *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Ohio Mun. 1972) (total abrogation of duty to pay rent would unjustly enrich tenant and be ruinous to landlord).

tenant is required to pay the reasonable rental value of the premises for the time of possession under the illegal contract doctrine, he is in no better position than he would be under an implied warranty of habitability theory.¹²²

There are several other reasons why the tenant might prefer or even be required to use the warranty of habitability theory. First, most of the decisions allowing the *Brown* illegality defense have held that for the illegal contract theory to apply, the housing code violations must have been in existence at the inception of the lease.¹²³ On the other hand, cases recognizing an implied warranty of habitability in residential leases have indicated that the warranty not only covers conditions existing at the inception of the lease, but also creates a duty on the part of the landlord to maintain the premises in a habitable condition throughout the entire term of the lease.¹²⁴

Second, the illegal contract theory depends upon the existence of a local housing code — there must be an ordinance which the contract violates before it can be declared illegal. In a number of jurisdictions, however, judicial decisions and/or landlord-tenant legislation indicates

¹²²Courts have adopted three different approaches to the measure of damages for breach of the warranty of habitability. The measure of damage under standard contract approach would be the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in their present condition. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). Under this approach the tenant might ultimately pay less than the fair rental value of the premises in their present condition. *See* discussion at *supra* note 71. Under the second approach the measure of damages would be the difference between the rent reserved under the lease and the fair rental value of the premises in their present condition. *E.g.*, *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248, 252 (1971). Under this approach the tenant would pay the same rent as he would under the illegal contract theory. *See* R. SCHOSHINSKI, *supra* note 102. Under the third approach the measure of damages would be based on the percentage of use which the tenant lost because of the breach — the agreed rent would be reduced by an equal percentage. *E.g.*, *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979). Once again, this should be close to, if not the same as, the amount of rent the tenant would be required to pay under the illegal contract theory. For a general discussion of the measure of damages under the implied warranty of habitability theory, see *supra* notes 65-76 and accompanying text.

¹²³*E.g.*, *Hinon v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976); *Riley v. Nelson*, 256 S.C. 545, 183 S.E.2d 328 (1971).

¹²⁴*E.g.*, *Javins v. First Nat'l Realty*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (the old nonrepair rule cannot coexist with obligations imposed upon landlord by typical modern housing code); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985) (warranty requires that dwelling remain habitable throughout the term of the lease); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (warranty of habitability creates a continuing duty on part of landlord to maintain the habitability of the dwelling during the entire term of the lease); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (premises must remain habitable throughout the term of the lease); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979) (this warranty is applicable at the beginning of the lease and throughout its duration).

that the implied warranty of habitability can exist independent of a local housing code.¹²⁵ Similarly, where local housing codes exist, they often provide only a minimum standard of habitability and would provide no help to the middle class tenant.¹²⁶ Some decisions and/or legislation suggest the "habitability" standard of the implied warranty might be higher than housing code standards.¹²⁷ Thus, where there are no local housing codes or where the local housing code does not cover the defective condition, the implied warranty of habitability might still provide a remedy.

Despite the recognition of an implied warranty of habitability in residential leases, the illegality doctrine may still prove useful to the tenant in situations where an implied warranty of habitability might not

¹²⁵*Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985) (housing code standards are only one factor to be considered in determining habitability); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (there may be instances where conditions not covered by the code regulations render the apartment uninhabitable); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979) (court declined to establish rigid standards for determining habitability preferring gradual development "in best common law tradition"). *But see* *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976) (warranty of habitability only applied where there is a local housing code in effect). *Compare* *Breezewood v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980), where the decision is not clear whether the warranty can exist separate and apart from a local housing code.

Much of the recently enacted landlord-tenant legislation does not use housing code standards to define habitability under the statutory warranty. For example, the Uniform Residential Landlord Tenant Act ("URLTA") which has been enacted in some 18 states, defines habitability in terms of essential services, but seems to apply state wide to all residential housing, whether or not a local housing code exists. For a discussion of URLTA and other recently enacted landlord-tenant legislation, see Cunningham, *supra* note 11, at 59-74.

¹²⁶*See* Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1457-58 (1974).

Additionally, where code standards are worded in vague language, a court might interpret the statute as requiring more than "minimum" standards for habitability. *See* *Himmel v. Chase Manhattan Bank*, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (N.Y. Civ. Ct. 1965) (defective air conditioning system and elevators in luxury apartment were "dangerous" conditions within meaning of statute allowing rent abatement).

¹²⁷*Glasoe v. Trinkle*, 497 N.E.2d 915 (Ill. 1985) (court declined to establish rigid standards for breach of warranty but gave guidelines distinct from housing code standards); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 201 n.16, 293 N.E.2d at 844 n.16 (1973) (there may be instances where conditions not covered by the code regulations render the apartment uninhabitable); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979) (existence of housing code violations is only one of several evidentiary considerations that enter into the materiality of the breach). *Contra* *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976) (implied warranty measured "solely" by housing code standards); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973) (landlord fulfills his obligation by substantial compliance with the relevant provisions of an applicable housing code).

Recently enacted landlord-tenant legislation such as URLTA establishes statewide standards of habitability which are often higher than local housing code standards. *See* Cunningham, *supra* note 11, at 65-74.

exist. In most jurisdictions, the implied warranty of habitability has been limited to residential leases and does not apply to commercial leases.¹²⁸ Although housing codes do not apply to commercial property,¹²⁹ where there are existing violations of building codes, electrical codes, or plumbing codes, the commercial tenant might be able to convince a court to apply the illegal contract doctrine.¹³⁰ Similarly, some jurisdictions by case law or legislation have limited the types of residential dwellings or types of leases to which the implied warranty of habitability applies.¹³¹ In such a jurisdiction, the local housing codes might still apply to the residential unit even though the court would not find an implied warranty of habitability. The illegal contract doctrine might provide some relief to a tenant in such a situation. Finally, there may be housing code violations which do not necessarily affect the habitability of the premises, such as the failure to register the unit or to obtain an occupancy permit. At least one decision has applied the illegality doctrine where such housing code violations existed even though no actual breach of an implied warranty of habitability was proven.¹³²

V. CONCLUSION

During the past sixteen years there has been nothing short of a revolution in residential landlord-tenant law. The application of the illegal contract doctrine to housing code violations and the recognition of an implied warranty of habitability in residential leases have replaced the old no duty to repair rule and the doctrine of *caveat lessee*. Nevertheless,

¹²⁸Most courts which have considered the issue have not extended the implied warranty of habitability to commercial leases. See R. SCHOSHINSKI, *supra* note 102, at § 3:29 n.61 (1980 and Supp. 1985).

¹²⁹See *supra* note 10.

¹³⁰The doctrine has been applied to leases in a variety of situations. See Hicks, *supra* note 4, at 470-81.

¹³¹A few states have limited the warranty of habitability to "multi-unit" rental structures. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (reinterpreted by Pole Co. v. Sorrells, 84 Ill. 2d 178, 49 Ill. Dec. 283, 417 N.E.2d 1297 (1981) (warranty of habitability applies to single family dwellings as well)); Zimmerman v. Moore, 411 N.E.2d 690 (Ind. App. 1982). At least one court has also indicated that the warranty should not apply where the landlord is not a merchant in the business of leasing property. Zimmerman v. Moore, 411 N.E.2d 690 (Ind. Ct. App. 1982). See also Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ. L. REV. 637 (1984); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

Other states have statutorily limited the warranty of habitability in various ways. MASS. GEN. LAWS ANN. ch. 186, § 19 (West 1981) (exempting owner-occupied two and three family dwellings); NEB. REV. STAT. § 76-1408(8) (1981) (excludes leases of five years or more); VA. CODE § 55-248.5 (1950) (not applicable to single family dwellings leased by landlord owning no more than 10 such residences).

¹³²Noble v. Alis, 474 N.E.2d 109 (Ind. Ct. App. 1985). See *supra* notes 27-42. *Contra* Curry v. Dunbar House, 362 A.2d 686 (D.C. App. 1976).

in Indiana, the limited number of judicial decisions and the lack of legislation have left the scope of these new tenant remedies and landlord obligations uncertain.

For the attorney representing either the residential landlord or residential tenant, the predictability of the outcome of controversy under traditional rules of landlord-tenant law no longer exists. While the doctrine of *caveat lessee* may indeed be dead in Indiana, the attorney must still exercise caution in advising his client until further developments clarify the current residential landlord-tenant law.

Asbestosis Amendment to the Occupational Diseases Act: Palliative or Cure

DENNIS F. CANTRELL*

I. INTRODUCTION

Sixty years have passed since a British doctor discovered the first case of asbestosis¹ in a person who had spent twenty years weaving asbestos textile products.² By the mid-1930's, the danger of asbestos as a pneumoconiotic dust³ was universally accepted.⁴ Since World War II, an estimated eight to eleven million American workers have been exposed to asbestos.⁵ Consequently, asbestos exposure is likely to result in approximately 1.6 million asbestos-related deaths.⁶ In 1982, an estimated sixteen thousand lawsuits involving personal injury as a result of asbestos exposure were pending.⁷ During the same year, new asbestos cases were being filed at the rate of four hundred fifty per month.⁸

The United States is currently in the midst of absorbing the emotional and economic devastation caused by asbestos exposure. The insidious⁹ nature of asbestos-related diseases, however, has posed a certain problem for many potential claimants in their suits for compensation. Many asbestosis claimants have found that their suits were barred by the applicable state tort statute of limitations. Because asbestosis is a latent disease which usually does not become manifest for twenty to thirty years,¹⁰ claimants are forced to file their lawsuits many years after the statute of limitations period has run. Some courts have ruled that these claims were time barred, even though the plaintiffs were not aware that they had contracted asbestosis until the limitations period had run.¹¹ Most state

*Executive Notes and Topics Editor, *Indiana Law Review*.

¹See Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 BRIT. MED. J. 147 (1924).

²*Id.*

³Pneumonconiosis is a chronic disease of the lungs marked by an overgrowth of connective tissue, which is caused by the inhalation of large quantities of dust. 3 SCHMIDTS' ATTORNEYS' DICTIONARY OF MEDICINE, P-201 (1984).

⁴See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973).

⁵Vagley & Blanton, *Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*, 16 FORUM 636, 647 (1981).

⁶See 127 CONG. REC. S10033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

⁷See Wall St. J., June 14, 1982, at 1, col. 6.

⁸*Id.*

⁹An "insidious disease" is defined as a disease that "progresses with few or no symptoms to indicate its gravity." STEDMAN'S MEDICAL DICTIONARY ILLUSTRATED 711 (23d ed. 1976).

¹⁰See *infra* notes 17-29 and accompanying text.

¹¹See, e.g., *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979); *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

courts or legislatures have corrected this problem and have allowed asbestosis claims after the claimants have first discovered the disease,¹² but a minority of states continue to adhere to an interpretation of their statutes of limitations that bars many asbestosis suits.¹³

Until quite recently, it appeared that Indiana would join the few states which apply traditional tort statute of limitations analysis in asbestosis cases.¹³ To correct this injustice, the Indiana legislature recently amended the Occupational Diseases Act¹⁴ to allow workmen's compensation claims by asbestosis victims for up to twenty years after their latest exposure to asbestos dust.¹⁵ Before the passage of this amendment and the recent Indiana Supreme Court opinion in *Barnes v. A.H. Robins Co.*,¹⁶ it appeared that Indiana asbestosis victims would be left without a remedy in the Indiana courts. The purpose of this Article will be to examine the workmen's compensation asbestosis amendment and its potential effect on Indiana law. To help explain why this amendment was necessary to provide a remedy for Indiana asbestosis victims, this Article will analyze the insidious nature of asbestosis and how prior Indiana law could have effectively barred asbestosis claimants from any chance for compensation. Finally, this Article will explore the potential ramifications of the recent asbestosis amendment.

II. THE CAUSE AND NATURE OF ASBESTOSIS

Asbestosis¹⁷ is a disease which is characterized by hardened fibers in the lungs because of the irritation caused by the inhalation of asbestos

¹²See *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978). For a list of cases, see *infra* note 55.

¹³See, e.g., *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

¹⁴IND. CODE § 22-3-7-1, as enacted by Pub. L. 141. This amendment was approved on April 14, 1985.

¹⁵IND. CODE § 22-3-7-9(f)(4), as enacted, now provides:

In all cases of occupational disease caused by the inhalation of asbestos dust in which the last date of the last exposure occurs on or after July 1, 1985, no compensation shall be payable unless disablement, as defined in subsection (e), occurs within twenty (20) years after the last day of the last exposure.

¹⁶476 N.E.2d 84 (Ind. 1985). The Indiana Supreme Court, on a certified question from the Seventh Circuit Court of Appeals in a case involving personal injuries from the use of a Dalkon Shield, ruled that a discovery rule interpretation would henceforth be used under the Product Liability Act statute of limitations in latent disease cases.

¹⁷Asbestosis is one of several asbestos-related diseases. Mesothelioma is a rare cancer which takes thirty to thirty-five years to manifest itself, but is ultimately fatal within two years of manifestation. 4A GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.72 (3d ed. 1980). Bronchogenic carcinoma usually does not become a problem for at least fifteen years after initial exposure. The prognosis for this disease is no different than for other lung cancers. *Id.* ¶ 205C.71. For purposes of this Article, only asbestosis will be considered.

dust.¹⁸ Asbestosis is the result of an irreversible process which causes fiber scarring of the lungs and develops over a long period of time from the inhalation of even a single asbestos fiber.¹⁹ This process usually does not cause noticeable symptoms until it has progressed at least ten years.²⁰ Generally, however, the disease does not manifest itself until ten to twenty-five or more years after initial exposure.²¹ Because asbestosis is the result of many years of latent lung tissue changes, it is medically impossible to pinpoint the date on which the disease actually developed.²²

The first noticeable sign of asbestosis is often a shortness of breath on exertion by a victim.²³ The disease may progress to cause shortness of breath during normal activity, and ultimately, to shortness of breath when a victim is at rest.²⁴ A severe case of asbestosis may produce difficulty in breathing in a sitting position.²⁵ Asbestosis can also cause a chronic cough and increased sputum production.²⁶ Other symptoms can include decreased expansion of the chest, rapid breathing rate, blueness of nailbeds, lips, and skin, and swelling of the fingers and/or toes caused by problems with oxygen saturation in the blood.²⁷ Asbestosis can result in death from suffocation or a minor respiratory infection caused by a large amount of already damaged lung tissue.²⁸ Asbestosis can also cause difficulty in eating and/or loss of appetite which results in wasting associated with anorexia.²⁹

III. EFFECT OF A STATUTE OF LIMITATIONS ON AN ASBESTOSIS CLAIM

In addition to causing physical harm, the insidious nature of asbestosis is problematic for asbestosis victims in a fundamental, legal way. When a typical asbestosis victim first discovers any symptoms of the disease many years after the initial asbestos exposure, the victim may find that the cause of action against an asbestos manufacturer or employer is barred by the applicable statute of limitations. Under traditional tort statutes of limitations, a plaintiff must file suit within a

¹⁸See STEDMAN'S MEDICAL DICTIONARY 116, 990 (3d unabr. law. ed. 1972).

¹⁹GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.21.

²⁰*Id.* ¶ 205C.30.

²¹See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d at 1083 (detailed discussion of the effects and history of asbestosis). See also Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965).

²²GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.72.

²³*Id.* ¶ 205C.30.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

certain number of years from when the cause of action "accrues."³⁰ This type of statute is known as an "occurrence" statute, because the limitations period commences at the time of the wrongful act, not when the plaintiff "discovers" the injury from the wrongful act.³¹

The general rule in traditional tort cases is that the defendant's act or omission alone, although constituting a breach of duty to the plaintiff, does not give rise to a cause of action and does not trigger the statute of limitations.³² Because harm to the plaintiff is essential to most tort actions, the courts have generally ruled that a cause of action does not "accrue" until the wrongful conduct causes an injury.³³ Courts have defined this injury as the initial harmful contact,³⁴ not the fully matured harm.³⁵ Consequently, courts have been reluctant to extend the accrual time of a claim because the plaintiff was unaware of the injury.³⁶ In

³⁰See, e.g., IND. CODE § 33-1-1.5-5, as enacted by Pub. L. 141, § 28 of Acts 1978. This statute provides:

This section applies to all persons regardless of minority or legal disability. Notwithstanding I.C. 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

³¹For purposes of this Article, a "discovery type" statute is one in which a cause of action accrues when a plaintiff discovers, or in the exercise of reasonable diligence, could have discovered, the disease. An "occurrence type" statute is one in which the cause of action accrues at the time of the wrongful act.

³²See *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

³³See, e.g., *Kitchener v. Williams*, 171 Kan. 540, 236 P.2d 64 (1951); *White v. Schnoebelen*, 91 N.H. 273, 18 A.2d 185 (1941).

³⁴See *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936). This was one of the earliest decisions in which injury was defined as "a wrongful invasion of personal or property rights." *Id.* at 300, 200 N.E. at 827. The court dismissed an action against an employer for damages from a lung disease allegedly caused by dirty working conditions because the court held that "[t]he injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust." *Id.* at 301, 200 N.E. at 827. Thus, the action was untimely even though the plaintiff was unaware of the injury until shortly before he brought the action. See also *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979) (radiation exposure); *Field v. Gazette Publishing Co.*, 187 Ark. 253, 59 S.W.2d 19 (1933) (lead poisoning); *Dalrymple v. Brunswick Coca-Cola Bottling Co.*, 51 Ga. App. 754, 181 S.E. 597 (1935) (tuberculosis); *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962) (foreign object left in patient's body); *Brown v. Tennessee Consol. Coal Co.*, 19 Tenn. App. 123, 83 S.W.2d 568 (1935) (silicosis); *Peterson v. Roloff*, 57 Wis. 2d 1, 203 N.W.2d 699 (1973) (foreign object left in patient's body).

³⁵The initial harmful contact in an asbestos claim is the inhalation of asbestos fibers, whereas the fully matured harm is the resultant disease of asbestosis.

³⁶See, e.g., *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979); *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962); *Peterson v. Roloff*, 57 Wis. 2d 1, 203 N.W.2d 699 (1973).

other words, a cause of action accrues within the meaning of a statute of limitations when an injury is inflicted by a wrongful act, not when the victim first discovers the injury. The statute of limitations begins to run at the time of the wrongful act which produces injury, not when the injury is discovered, even though the victim may be unaware of the injury.

This traditional rule poses a significant problem for potential asbestosis claimants because the long latency period of asbestosis is inherently unascertainable.³⁷ Despite the harshness of the interpretation that a cause of action accrues upon the date of the wrongful act, some courts have applied this rule to latent disease cases.³⁸

Recognizing the injustice that could occur in requiring plaintiffs to file suit before knowledge of any injury, courts began to develop alternative theories to determine when a cause of action "accrues." One prevalent theory is what is termed the discovery rule. The United States Supreme Court originally approved a discovery rule in a latent disease case in *Urie v. Thompson*.³⁹ In *Urie*, a railroad fireman contracted silicosis because of his occupational exposure to silica dust from 1910 to 1940.⁴⁰ Urie filed suit in 1941 under the Federal Employers' Liability Act⁴¹ against the trustee of the Missouri Pacific Railroad.⁴² The railroad argued that the three-year limitations period within the Act commenced in 1910 when Urie was first exposed to silica dust.⁴³ The Court rejected this argument and held that Urie's cause of action accrued when the effects of the silica dust became manifest in 1940.⁴⁴ The Court reasoned that charging a person with knowledge of a latent disease before its manifestation would force him to waive his rights to recovery if he later discovered a disability.⁴⁵ Further, the Court was convinced that the Act

³⁷See *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978). The long latency period which usually precedes the manifestation of asbestosis is unknowable because there are no discoverable symptoms until the lung tissue changes finally mature into the disease. *Id.*

³⁸See *supra* note 34.

³⁹337 U.S. 163 (1949).

⁴⁰*Id.* at 165.

⁴¹45 U.S.C. § 51 (1976). Section 1 of the Federal Employer's Liability Act provides in pertinent part:

Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering . . . injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

⁴²337 U.S. at 165.

⁴³*Id.* at 169.

⁴⁴*Id.* at 170.

⁴⁵*Id.* at 169.

was intended to afford plaintiffs more than a "delusive remedy,"⁴⁶ and refused to deny relief because of the plaintiff's "blameless ignorance."⁴⁷ The Court also held that Urie could recover damages for the entire period of exposure.⁴⁸ With this opinion, the Court revolutionized the traditional interpretation of statutes of limitations by using a discovery rule to afford relief to plaintiffs who suffered injuries years after their initial exposure to harmful substances.

Urie laid the foundation for the rule that, in latent injury claims, a plaintiff's notice of his injury is essential to the accrual of his cause of action. Since *Urie*, courts adopting a discovery rule interpretation have differed as to what constitutes sufficient notice. One approach, suggested by *Urie*, is that a cause of action accrues when the plaintiff discovers the injury. This approach was first used in an asbestos case in *Borel v. Fibreboard Paper Products Corp.*⁴⁹ in 1973.

In that case, the plaintiff, Borel, contracted asbestosis and a form of lung cancer as a result of his thirty-year exposure to asbestos as an asbestos insulation worker. He sued several manufacturers in 1969, but his widow was substituted as plaintiff when he died before trial.⁵⁰ Relying on *Urie*, the Fifth Circuit Court of Appeals ruled that his action was timely because his cause of action did not accrue until he discovered his injuries in 1969.⁵¹ The court traced the history and insidious nature of asbestosis⁵² and cited several cases involving injuries from exposure to other harmful substances.⁵³

Today, a majority of courts apply a discovery rule of some sort in latent disease cases. Several state legislatures have statutorily adopted this rule,⁵⁴ while in many states the rule has been judicially adopted.⁵⁵

⁴⁶*Id.*

⁴⁷*Id.* at 170.

⁴⁸*Id.* at 169-70.

⁴⁹493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

⁵⁰*Id.* at 1086.

⁵¹*Id.* at 1102.

⁵²*Id.* at 1083-86.

⁵³*United States v. Reid*, 251 F.2d 691 (5th Cir. 1958); *Associated Indemnity Corp. v. Industrial Accident Comm'n*, 124 Cal. App. 378, 12 P.2d 1075 (1932); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967).

⁵⁴See ALA. CODE § 6-2-30 (Supp. 1984); CAL. CIV. PROC. CODE ANN § 340.2 (West 1982); FLA. STAT. ANN. § 95.031(2) (1982); OHIO REV. CODE ANN. § 2305.10 (Page 1981); TENN. CODE ANN. § 29-28-103(b) (1979).

⁵⁵To date, at least thirty-four jurisdictions have applied a discovery rule in a latent disease type cause of action. See *Cazalas v. Johns-Manville Sales Corp.*, 435 So. 2d 55 (Ala. 1983); *Mack v. A.H. Robins Co.*, 573 F. Supp. 149 (D. Ariz. 1983) (applying Arizona law); *Velasquez v. Fibreboard Paper Products Corp.*, 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979); *Ricciuti v. Voltarc Tubes, Inc.* 277 F.2d 809 (2d Cir. 1960) (applying Connecticut law); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (applying District of Columbia law); *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922 (Fla. Dist. Ct. App. 1984); *Anderson v. Sybron Corp.*, 299 S.E.2d 922 (Ga. App. 1983); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981); *Franzen v.*

The result has been a clear trend in the United States toward the application of a discovery rule in a latent disease claim.

IV. INDIANA LAW PRIOR TO THE WORKMEN'S COMPENSATION ASBESTOSIS AMENDMENT

A. *Pre-Amendment Occupational Diseases Act — Statute of Limitations*

Before the passage of the asbestosis amendment to the Occupational Diseases Act, it appeared to the Indiana legislature that Indiana asbestosis victims would be left without a remedy for their injuries under the Occupational Diseases Act and the Product Liability Act statutes of limitations. Before the amendment to the Occupational Diseases Act, asbestosis victims were required by the statute to file their claims for compensation within three years after their latest exposure to the asbestos dust.⁵⁶ This limitations period was the traditional tort-type "occurrence"

Deere & Co., 334 N.W.2d 730 (Iowa 1983); *Miller v. Beech Aircraft*, 204 Kan. 184, 460 P.2d 535 (1969); *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497 (Ky. 1979); *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978); *Bonney v. Upjohn Corp.*, 129 Mich. App. 18, 342 N.W.2d 551 (1983); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975) (applying Michigan law); *Much v. Sturm, Ruger & Co.*, 502 F. Supp. 743 (D. Mont. 1980); *Condon v. A.H. Robins Co.*, 349 N.W.2d 622 (Neb. 1984); *Oak Grove Investors v. Bell & Gossett Co.*, 668 P.2d 1075 (Nev. 1983); *Cinnaminson Township Bd. v. United States Gypsum*, 552 F. Supp. 885 (D.N.J. 1982); *Levin v. Isoserve Inc.*, 70 Misc. 2d 747, 334 N.Y.S.2d 796 (1972); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Gillespie v. American Motors Corp.*, 277 S.E.2d 100 (N.C. 1981); N.D. CENT. CODE § 28-01.1-02 (Supp. 1985); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981) (applying Ohio law); *Lundy v. Union Carbide Corp.*, 695 F.2d 394 (9th Cir. 1982) (applying Oregon law); *Neal v. Carey Canadian Mines Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982); *Murphee v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982) (applying Tennessee law); *Fusco v. Johns-Manville Products Corp.*, 643 F.2d 1181 (5th Cir. 1981) (applying Texas law); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900 (Va. 1981); *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash. 2d 550, 663 P.2d 473 (1983); *Pauley v. Combustion Engineering Inc.*, 528 F. Supp. 759 (D. W. Va. 1981); *Hansen v. A.H. Robins Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

⁵⁶See former IND. CODE § 22-3-7-9(e), amended by Pub. L. No. 224-1985, § 1, which provided:

(e) No compensation shall be payable for or on account of any occupational diseases unless disablement, as herein defined, occurs within two [2] years after the last day of the last exposure to the hazards of the disease except in cases of occupation diseases caused by the inhalation of silica dust or asbestos dust and in such cases, within three [3] years after the last day of the last exposure to the hazards of such disease: Provided, That in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as herein defined, occurs within two [2] years from the date in which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

limitations period, which would essentially deny asbestosis victims the very right to recovery that the statute was intended to provide.⁵⁷ This conclusion became painfully clear when the Indiana Supreme Court decided *Bunker v. National Gypsum Co.*⁵⁸

In *Bunker*, the plaintiff was exposed to asbestos fibers when he worked for National Gypsum Company from February, 1949, until November, 1950.⁵⁹ He was not exposed to asbestos fibers after November, 1950.⁶⁰ He underwent exploratory surgery in July, 1976, and was diagnosed as suffering from asbestosis.⁶¹ On June 17, 1978, he applied to the Industrial Board of Indiana for disability benefits under the Occupational Diseases Act.⁶² Mr. Bunker claimed that his permanent disability was the result of his work-related exposure to asbestos dust at National Gypsum Co.⁶³ The Industrial Board ruled that his claim was not compensable because his disability did not arise within three years of the date of his last job-related exposure to asbestos dust.⁶⁴ The Indiana Court of Appeals reversed the Industrial Board, finding the statute of limitations unconstitutional.⁶⁵

The Indiana Supreme Court vacated the opinion of the court of appeals and reinstated the ruling of the Industrial Board.⁶⁶ The plaintiff argued that it was an unconstitutional denial of due process to rule that the time for claiming the remedy had expired before it could have accrued.⁶⁷ The supreme court, nevertheless, affirmed the constitutionality of the statute of limitations.⁶⁸ The court ruled that a statute of limitations satisfies due process requirements as long as it provides a reasonable time for the maintenance of an action.⁶⁹ The court maintained that it would not infringe on the legislature's sole responsibility to "determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."⁷⁰ To do so, according to the court, would usurp the legislature's constitutionally mandated function.⁷¹ The result of this decision

⁵⁷See *supra* notes 30-31 and accompanying text.

⁵⁸441 N.E.2d 8 (Ind. 1982).

⁵⁹*Id.* at 9.

⁶⁰*Id.* at 10.

⁶¹*Id.*

⁶²*Id.* at 9.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵426 N.E.2d 422, 425 (Ind. Ct. App. 1981), *vacated*, 441 N.E.2d 8 (Ind. 1982).

⁶⁶441 N.E.2d at 9.

⁶⁷*Id.* at 10.

⁶⁸*Id.* at 9.

⁶⁹*Id.* at 12 (citing *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913); *Guthrie v. Wilson*, 240 Ind. 188, 194, 162 N.E.2d 79, 81 (1959)).

⁷⁰*Id.* (citing *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902)).

⁷¹*Id.* at 13.

was that Mr. Bunker was denied workmen's compensation because he did not bring his claim within three years of his last exposure to asbestos dust, even though he probably did not even have asbestosis during those three years.⁷²

After *Bunker v. National Gypsum*, it became painfully clear that asbestosis victims were practically without a remedy under the Occupational Diseases Act because of its statute of limitations. It was possible, however, for asbestosis claimants to file lawsuits for compensation in the Indiana courts against asbestos manufacturers, provided the defendants were not employers of the plaintiffs.⁷³ At that time, however, it appeared that these lawsuits could also be barred under the Indiana Product Liability Act statute of limitations.

B. Product Liability Statute of Limitations

The Indiana Product Liability statute of limitations⁷⁴ had not been interpreted by the Indiana courts in a latent disease case before the Seventh Circuit Court of Appeals decided *Braswell v. Flintkote Mines, Ltd.*⁷⁵ In *Braswell*, seven former employees of the World Bestos Division of the Firestone Tire and Rubber Company in New Castle, Indiana, filed claims for damages based on their exposure to asbestos manufactured or supplied by several defendants.⁷⁶ These diversity actions were consolidated for decision by the United States District Court for the Southern District of Indiana.⁷⁷ The first of these actions was filed on November 30, 1979, while the other six actions were filed between January and July of 1981.⁷⁸ None of the plaintiffs filed claims within two years of their last exposure to asbestos dust.⁷⁹ The trial court granted summary judgment in favor of the defendants, stating that the plaintiffs' claims were barred by the statute of limitations.⁸⁰ The trial court ruled that the claims accrued within the meaning of the statute at the time of the

⁷²See *supra* notes 17-29 and accompanying text.

⁷³See IND. CODE § 22-3-2-6 (1982).

⁷⁴See IND. CODE § 33-1-1.5-5 (1982).

⁷⁵723 F.2d 527 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2690 (1984).

⁷⁶*Id.* at 528.

⁷⁷*Id.* at 529.

⁷⁸*Id.* at 528.

⁷⁹*Id.* Plaintiff Orvil Braswell was employed at the plant from 1950 to 1975. He apparently first noticed symptoms in 1972 and was told by his doctor in 1979 that he had an asbestos-related disease. *Id.* Other plaintiffs and their last exposure to asbestos were: James T. Clapp, 1963; Omer T. Rogers, 1969; William M. Baker, 1974; Helen M. Igo, 1979; and Robert E. Godfrey, 1979. *Id.* Plaintiffs Igo and Godfrey filed within two years of their last exposure to asbestos, but their claims were denied on other grounds. *Id.* at 528 n.1.

⁸⁰*Id.* at 533.

wrongful acts, which the court concluded to be no later than the plaintiffs' most recent exposure to the asbestos fiber.⁸¹

The Seventh Circuit Court of Appeals affirmed the ruling of the trial court in a two-to-one decision.⁸² The majority held that the plaintiffs' causes of action accrued at the time of the wrongful acts, not at the time the injuries were discovered or were susceptible of ascertainment.⁸³ Thus, the court rejected the application of a discovery rule in this case and granted summary judgment against the plaintiffs.⁸⁴

Because there were no Indiana cases on point, the court in *Braswell* analyzed the relevant Indiana case law to determine how the Indiana Supreme Court would interpret the statute if faced with this factual situation.⁸⁵ In arriving at its conclusion that the statute of limitations is an "occurrence" statute,⁸⁶ the court placed primary reliance on the Indiana Supreme Court opinion of *Shideler v. Dwyer*.⁸⁷

In *Shideler*, the beneficiary of a provision in a will sued the attorney who had drafted it because the provision was later declared invalid. The will was executed in October, 1973, and the testator died on December 14, 1973.⁸⁸ The will was admitted to probate on December 21, 1973.⁸⁹ When the beneficiary did not receive the expected payment under the will, she filed suit on November 13, 1974, asking the probate court to construe the will.⁹⁰ The provision was declared invalid by the probate court on June 30, 1975, and the beneficiary instituted suit against the attorney on June 29, 1977.⁹¹

The defendant contended that the two-year statute of limitations⁹² barred the suit because the cause of action accrued and the damage occurred when the testator died in 1973.⁹³ The plaintiff-beneficiary maintained that the statute did not begin to run until the probate court declared the provision invalid, because she had sustained no damage from the defendant's acts or omissions until the court invalidated the

⁸¹*Id.* The court also ruled that IND. CODE § 33-1-1.5-5 did not deny the plaintiffs due process or equal protection under the fourteenth amendment. *Id.* at 531. Although the court interpreted IND. CODE § 33-1-1.5-5, the court also applied the same reasoning to IND. CODE § 34-1-2-2, which applied to all but two plaintiffs. *Id.* at 529.

⁸²*Id.* at 528. Senior Circuit Judge Swygert filed a dissenting opinion. *Id.* at 533.

⁸³*Id.* at 532.

⁸⁴*Id.* at 533.

⁸⁵*Id.* at 532.

⁸⁶*Id.*

⁸⁷417 N.E.2d 281 (Ind. 1981).

⁸⁸*Id.* at 284.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.* at 288. The statute at issue was IND. CODE § 34-1-2-2, which presently contains the same language.

⁹³417 N.E.2d at 290.

provision.⁹⁴ The plaintiff contended that she was unaware of the legal injury which she sustained at the testator's death because the probate court could have upheld the validity of the provision at issue.⁹⁵

The *Shideler* court granted summary judgment against the plaintiff-beneficiary under this statute, and held that the two-year period of limitations had expired because the damage occurred upon the testator's death, not on the date that the probate court declared the will's provision invalid.⁹⁶ In rejecting a discovery rule for the accrual of a cause of action, the court held that a plaintiff's ignorance of the damage does not affect the running of the statute of limitations.⁹⁷ The court maintained that the plaintiff misunderstood the term "damage" as a requisite element of any tort and "damages" as a measure of compensation.⁹⁸ According to the court, "For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."⁹⁹ Thus, the statute of limitations begins to run from the time when liability for a wrong has arisen, even if the plaintiff is ignorant of the existence of the wrong or injury.

The Indiana Supreme Court in *Shideler* supported its conclusion by citing with approval two New York opinions. In *Schwartz v. Heyden Newport Chemical Corp.*,¹⁰⁰ a medical malpractice action accrued when a radioactive and carcinogenic substance was placed in the plaintiff's sinuses, not when the carcinoma which the substance produced was discovered fifteen years later.¹⁰¹ In *Schmidt v. Merchants Dispatch Transportation Co.*,¹⁰² the court ruled that an asbestosis claim accrued when the plaintiffs inhaled the dust, not at the time when the dust resulted in the disease more than three years after the inhalation of the dust.¹⁰³

⁹⁴*Id.* at 288.

⁹⁵*Id.*

⁹⁶*Id.* at 290.

⁹⁷*Id.* at 289.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, *amended on other grounds*, 12 N.Y.S.2d 896, 190 N.E.2d 253, *cert. denied*, 374 U.S. 808 (1963).

¹⁰¹417 N.E.2d at 289.

¹⁰²270 N.Y. 287, 200 N.E. 824 (1936). *See also supra* note 34.

¹⁰³270 N.Y. at 301, 200 N.E. at 827. Additionally, the *Shideler* court quoted with approval a passage from *Schmidt*:

That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.

417 N.E.2d at 290 (quoting 270 N.Y. at 300, 200 N.E. at 827).

After analyzing these cases, the *Braswell* court ruled that the Indiana courts would probably reject the application of a discovery rule in a latent disease case,¹⁰⁴ primarily because the *Shideler* court quoted with approval *Schmidt*, the New York asbestos case.¹⁰⁵ The Seventh Circuit reached this conclusion even though the Indiana courts had never interpreted the statute of limitations in an asbestosis claim before *Braswell*.¹⁰⁶ The court noted, however, that it would have preferred a discovery rule interpretation, but declined to make this ruling because of *Shideler*.¹⁰⁷ In fact, in a footnote, the *Braswell* court maintained that if it were free to write on a clean slate, it might have adopted the discovery rule, which has a growing number of adherents.¹⁰⁸

Before the passage of the asbestosis amendment to the Indiana Workmen's Compensation statute, if the Indiana courts had followed the *Braswell* decision, the result would surely have been that Indiana asbestosis victims would be left without a remedy for their injuries. If an asbestosis claimant happened to file suit under the Product Liability Act against a manufacturer within two years of the claimant's last exposure to the asbestos dust, the claimant faced almost certain summary judgment.¹⁰⁹ At that point, while there may be asbestos "bodies"¹¹⁰ or fibers in the claimant's lungs, it is relatively certain that these fibers have not progressed into asbestosis.¹¹¹ Even though there would be an invasion of the claimant's body by asbestos fibers, in the absence of the manifested disease, there would be no damage, and hence, no cause of action.¹¹² If a claimant filed suit ten years after his last exposure to asbestos dust, because that is the time at which his symptoms first became noticeable, the defendant-manufacturer would certainly prevail on summary judgment. A court would be forced to rule that the claim was barred because it was not brought within two years of the plaintiff's last inhalation of asbestos dust. Because of this, Indiana asbestosis victims would be forced to bring suit within two years of ingestion of the dust and continue their cases as long as possible, clog the courts, and wait for the manifestation of the disease, which may not even occur.¹¹³ The effect would surely have been that asbestosis victims in Indiana would

¹⁰⁴723 F.2d at 532.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*See Braswell*, 723 F.2d at 529.

¹¹⁰Asbestos "bodies" are small particles of various shapes found in the lungs of patients afflicted with asbestosis. These bodies initiate the progression of the disease. 1 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE A-308 (1984).

¹¹¹*See Borel*, 493 F.2d at 1083-86.

¹¹²*See Braswell*, 723 F.2d at 532.

¹¹³*See Borel*, 493 F.2d at 1083-86.

be left without a remedy for the negligent conduct of the defendant-manufacturers.

V. WORKMEN'S COMPENSATION ASBESTOSIS AMENDMENT

To remedy the injustice that would flow to Indiana asbestosis victims because of the *Bunker v. National Gypsum Co.* decision, and because it was possible the Indiana courts would follow *Braswell*, the legislature amended the Occupational Diseases Act.¹¹⁴ The amendment allows workmen's compensation claims by asbestosis victims within twenty years after the last day of their last exposure to asbestos dust if their last exposure occurred on or after July 1, 1985.¹¹⁵ Any claimants whose last exposure to asbestos dust in the workplace occurred before July 1, 1985, are required, under the amendment, to file their claims within three years from their last exposure.¹¹⁶

To recover compensation under this amendment, asbestosis claimants must be disabled within the meaning of the amendment.¹¹⁷ For those claimants eligible for compensation, the statute provides that compensation shall be computed from average weekly wages which are set by the statute.¹¹⁸ In addition, the statute sets a maximum dollar amount that any claimant can receive for disabilities.¹¹⁹

Recognizing that there would be many claimants whose claims have lapsed in spite of the new amendment, the amendment also established a Residual Asbestos Injury Fund.¹²⁰ Under this section, employees who have become permanently and totally disabled and are not eligible for compensation because their claims have lapsed can now receive benefits if their claims are filed before January 1, 1986.¹²¹ Presumably, this fund

¹¹⁴See *supra* note 15 and accompanying text. The amendment became effective July 1, 1985.

¹¹⁵See IND. CODE § 22-3-7-9(f)(4) (Supp. 1985).

¹¹⁶*Id.*

¹¹⁷IND. CODE § 22-3-7-9(e) defines disablement as:

... the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment, and "disability" means the state of being so incapacitated.

¹¹⁸See IND. CODE § 22-3-7-19 (Supp. 1985).

¹¹⁹See, e.g., IND. CODE § 22-3-7-19(e), which provides, "The maximum compensation with respect to disability or death occurring on and after July 1, 1986, which shall be paid for occupational disease . . . may not exceed ninety-five thousand dollars (\$95,000) in any case."

¹²⁰The legislature enacted a new chapter to the Indiana Code at § 22-3-11-1.

¹²¹See IND. CODE § 22-3-11-3 (Supp. 1985), which provides:

(a) An employee who:

(1) becomes totally and permanently disabled:

(A) on or after July 1, 1985, from an exposure to asbestos in employment before July 1, 1985; or

was established to compensate those asbestosis victims, like the plaintiff in *Bunker v. National Gypsum Co.*, who were not eligible for benefits under the prior statute.

VI. RAMIFICATIONS OF THE OCCUPATIONAL DISEASES ACT ASBESTOSIS AMENDMENT

The Occupational Diseases Act asbestosis amendment is an important and necessary change in Indiana law. Prior to the enactment of this amendment, asbestosis victims were practically left without any chance for workmen's compensation. Asbestosis is a crippling and often deadly disease.¹²² Medical bills can be staggering for those workers inflicted with asbestosis. The Occupational Diseases Act was intended to provide compensation for victims of asbestosis,¹²³ but the prior three-year statute of limitations effectively denied this remedy to asbestosis victims.¹²⁴ Because asbestosis is an insidious disease which usually does not become manifest for many years, asbestosis victims under the prior statute found that their workmen's compensation claims were barred by the three-year statute of limitations.¹²⁵

In enacting the asbestosis amendment, however, the legislature did not enact the best possible limitations period for asbestosis workmen's compensation claims. The new twenty-year statute of limitations should not be a bar to many claims, but there will be some claimants who will be barred under the new statute as well. The evidence on asbestosis is clear that many victims do not become afflicted until more than twenty years have passed since their last exposure to asbestos dust.¹²⁶

(B) before July 1, 1985, from an exposure to asbestos in employment and files a claim under this chapter before January 1, 1986;

(2) is unable to be self-supporting in any gainful employment because of the disability caused by the exposure to asbestos; and

(3) is not eligible for benefits under IC 22-3-7;

may be eligible for benefits from the fund if the employee is not entitled to other available benefits from social security, disability retirement, or other retirement benefits or third party settlements equal to or greater than sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the average weekly wage, as defined in IC 22-3-7-19, at the date of disablement. An employee's eligibility shall be determined by the board by rule adopted under IC 4-22-2.

(b) If the employee has other available benefits but they are less than sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the average weekly wage at date of disablement, the employee is eligible to receive from the fund a weekly benefit amount not to exceed the difference between the other available benefits and sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the average weekly wage on the date of disablement for a period not to exceed fifty-two weeks (52) weeks.

¹²²See *supra* notes 17-29 and accompanying text.

¹²³See, e.g., *Rowe v. Gatke Corp.*, 126 F.2d 61 (7th Cir.), *petition dismissed*, 317 U.S. 702 (1942).

¹²⁴See *supra* notes 58-72 and accompanying text.

¹²⁵*Id.*

¹²⁶See *supra* notes 17-29 and accompanying text.

Moreover, under the new statute, asbestosis claimants must become disabled within the meaning of the statute within twenty years after exposure before they are eligible for workmen's compensation.¹²⁷ While many claimants will become aware of their disease within twenty years of their last exposure, it is likely that many of these victims will not become disabled until after the twenty-year period has elapsed.

An excellent example of how an asbestosis victim can remain without a remedy under the new amendment is presented by *Bunker v. National Gypsum Co.*,¹²⁸ the very case which motivated the legislature to revise the statute. Mr. Bunker did not discover his disease until twenty-six years had passed from his last exposure to asbestos dust.¹²⁹ Under the new amendment, if Mr. Bunker's last date of exposure had occurred after July 1, 1985, and if he failed to discover his disease twenty-six years later, the new amendment would also bar his claim.

The best possible solution to the asbestosis problem would have been the enactment of a discovery rule with a short limitations period.¹³⁰ In that way, if an asbestosis victim does not become aware of his disease until twenty-five years after his latest exposure, he would have two or three years in which to file his claim after he discovers, or should reasonably have discovered, his disease.

The legislature did not adopt a discovery rule provision for asbestosis claims, however, presumably as a compromise with employers and insurance companies. The legislature chose a twenty-year period as a reasonable length of time for the manifestation of many cases of asbestosis. The legislature was aware of the discovery rule possibility, because the same statute contains a discovery rule for victims of radiation exposure.¹³¹ The reasons for providing a discovery provision in cases of radiation exposure are the same for adopting a discovery provision for asbestosis cases. Both are latent diseases which usually do not become manifest for several years after exposure to the harmful substance.

The new amendment will also be problematic for some asbestosis victims in another way. The claimants who find their claims barred under the new amendment because their disease did not appear within twenty years have no other remedy to receive compensation from their

¹²⁷See *supra* note 117 and accompanying text.

¹²⁸See *supra* notes 58-72 and accompanying text.

¹²⁹See 441 N.E.2d at 10.

¹³⁰For instance, the amendment could have provided:

In all cases of occupational disease caused by the inhalation of asbestos dust, no compensation shall be payable unless disablement, as defined in subsection (e), occurs within two years from the date on which the employee had knowledge of the nature of his occupational disease or, by the exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

¹³¹See IND. CODE § 22-3-7-9(f)(2) (Supp. 1985).

employers. The Occupational Diseases Act provides the exclusive remedy for employees in their claims for compensation from employers.¹³² After *Barnes v. A.H. Robins*,¹³³ these claimants should have the benefit of a discovery rule under the Product Liability Act in their suits against manufacturers of asbestos,¹³⁴ but will not have the benefit of a discovery rule under the Occupational Diseases Act in their claims for compensation against their employers.

VII. CONCLUSION

The new asbestosis amendment to the Indiana Occupational Diseases Act will help remedy an unjust situation for many asbestosis victims. The amendment will provide compensation for many claimants who otherwise would not have received compensation for their injuries. The asbestosis amendment, however, was not the best solution for asbestosis claimants under the Occupational Diseases Act because many claimants will remain without a remedy from their employers for their injuries. The Occupational Diseases Act was intended, however, to compensate these victims as well and will not realize this objective.

¹³²See *Bunker v. National Gypsum Co.*, 406 N.E.2d 1239, 1241 (Ind. Ct. App. 1980).

¹³³476 N.E.2d 84 (Ind. 1985).

¹³⁴See *id.*

A Limited Discovery Rule for Indiana: *Barnes v. A.H. Robins Company*

JORDAN H. LEIBMAN*

I. INTRODUCTION

A. *The Problem of Delay*

There is nothing new about the "delay" problem in Indiana tort law. In *Barnes v. A.H. Robins Co.*,¹ the Indiana Supreme Court relied heavily on a nineteenth century case involving a collapsing bridge² to explain its decision henceforth to run the Indiana personal injury statute of limitations in delayed manifestations disease cases "from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another."³

The problem of delay arises when the defendant's wrongful act results in harm to the plaintiff only after a considerable passage of time. The question, then, is whether the claim should be permitted to go forward.⁴ In recent years courts have increasingly confronted this issue in the context of delayed manifestation diseases contracted by plaintiffs who have been exposed to deleterious substances or harmful medical devices which only later produce symptoms of serious personal physical harm.⁵ Yet Indiana courts have long wrestled with harmful

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¹476 N.E.2d 84 (Ind. 1985). Following the Indiana Supreme Court's answering of the certified question and remand of the case to the Seventh Circuit, the final disposition of the case has been stayed pending bankruptcy proceedings. For an interpretation of the Indiana Supreme Court's holding in *Barnes*, see *Miller v. A.H. Robins Co.*, 766 F.2d 1102 (7th Cir. 1985) and *infra* notes 91 and 249.

²476 N.E.2d at 86 (discussing *Board of Comm'rs of Wabash County v. Pearson*, 120 Ind. 426, 22 N.E. 134 (1885)).

³476 N.E.2d at 87-88.

⁴See generally PROSSER, *LAW OF TORTS* 143-45 (4th ed. 1971) (discussing the delay problem in the context of negligence cases and noting various devices employed by courts to escape harsh consequences including the then (1971) emerging "discovery rule"); 54 C.J.S. *Limitations of Actions* § 168 (1948) (noting that the general rule at common law for tort actions is to begin the limitation period when "the act causing the injury is committed, which may or may not be the date on which actual damage is sustained"); McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 588-600 (1981) (discussing the delay problem in the context of a "Policy Analysis of Product Liability Statutes of Repose"); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-03 (1950) (discussing the choice of when to begin the statutory period "where considerable time intervenes") [hereinafter cited as *Statutes of Limitations*].

⁵See, e.g., *Braswell v. Flinkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) (asbestos);

delayed effects in tort cases involving collapsing structures,⁶ professional malpractice,⁷ conversion of personal property,⁸ damage to personal property,⁹ damage to real property,¹⁰ damage to crops,¹¹ alienation of affections,¹² eminent domain proceedings,¹³ and other situations in which the injury is either nonexistent or nonapparent¹⁴ until long after the wrongful act has taken place. It is in these cases, most of them having nothing to do with products, that the precedents governing product-related injuries are to be found.

Fixing the length and starting point for a timing limitations statute is a legislative exercise in balancing conflicting interests. The injured plaintiff's access to the courts to secure a remedy for harm caused by

Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980) (Mer/29); Barnes v. A.H. Robins Co., 476 N.E.2d 84 (Ind. 1985) (Dalkon Shield intrauterine device); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (catheter); Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 467 N.E.2d 517 (1984) (DES).

⁶See, e.g., Board of Comm'rs v. Pearson, 120 Ind. 426, 22 N.E. 134 (1885) (discussed *infra*, notes 70-72 and accompanying text).

⁷See, e.g., Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981) (discussed *infra*, notes 115-35 and accompanying text); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956) (see *infra* notes 204-13 and accompanying text); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (discussed *infra*, notes 136-40 and accompanying text); Cordial v. Grim, 169 Ind. App. 58, 346 N.E.2d 266 (1976) (discussed *infra*, notes 105-12 and accompanying text); Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975) (discussed *infra*, notes 108-10 and accompanying text).

⁸See, e.g., French v. Hickman Moving & Storage, 400 N.E.2d 1384 (Ind. Ct. App. 1980) (discussed *infra*, notes 97-104 and accompanying text).

⁹See, e.g., Essex Wire v. M.H. Hilt Co., 263 F.2d 599 (7th Cir. 1959) (discussed *infra*, notes 83-84 and accompanying text).

¹⁰See, e.g., Monsanto v. Miller, 455 N.E.2d 392 (Ind. Ct. App. 1983) (discussed *infra*, notes 141-48 and accompanying text).

¹¹See, e.g., Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957) (discussed *infra*, notes 77-82 and accompanying text).

¹²See, e.g., Montgomery v. Crum, 191 Ind. 660, 161 N.E. 251 (1928) (discussed *infra*, notes 73-76 and accompanying text).

¹³See, e.g., Scates v. State, 178 Ind. App. 624, 383 N.E.2d 491 (1978) (see *infra* note 193 and accompanying text).

¹⁴It is important to make the distinction between cases where — after the defendant has acted — the *injury itself* is delayed, from cases where the *manifestation of injury* is delayed. An example of the former type would be the case of a defectively designed punch press which has a designed-in tendency to "double-trip." The defendant manufacturer may have introduced the product into the stream of commerce many years ago, but no injury to a user will occur until the press actually amputates a user's hand or finger. Although it is well-settled that such an injured user will not be barred by an accrual-based statute of limitations, the new product liability repose statutes that are occurrence-based could bar such claims. See *infra* notes 31-40 and accompanying text. The latter type of case, that involving delayed manifestation, poses the problem addressed by this Article. In these cases, harm has occurred, but the plaintiff is unaware of it. The question is whether such claims should be barred by *accrual-based* statutes of limitations until the plaintiff has had a reasonable opportunity to discover the harm, its nature, its causal nexus to the defendant's product, and possibly, whether the defendant has in fact acted wrongfully. This Article does not address the related question whether such claims should be barred by the occurrence-based repose statutes.

alleged wrongful conduct must be balanced with the defendant's need to have access to evidence fresh enough to mount an effective defense.¹⁵ In addition, the societal interest in bringing private disputes promptly to rest must be served.¹⁶

In general, relief for serious injury will be pursued promptly; delayed claims are, therefore, properly suspect.¹⁷ It is reasonable to presume that excessive delay by the plaintiff in bringing a claim is tantamount to an implied waiver of the claim.¹⁸ Nonetheless, when delay in pressing a claim results from no fault of the plaintiff, the waiver presumption is properly rebutted.¹⁹ In any case, delay — for any reason — prejudices the defendant's ability to marshal evidence.²⁰

B. Economic Effects of Delay

There are also economic arguments against exposing business entities — so called "enterprise" defendants²¹ — to liability for indefinite periods

¹⁵See 51 AM. JUR. 2d *Limitations of Actions* § 18 (1970); *Statutes of Limitations*, *supra* note 4, at 1185-86.

¹⁶There are two primary societal interests to be served by prompt dispute resolution: a general peacekeeping interest, 51 AM. JUR. 2d § 18, *supra* note 15, and the commercial interest "in avoiding the disrupting effect that unsettled claims have on commercial intercourse." *Statutes of Limitations*, *supra* note 4, at 1185.

¹⁷51 AM. JUR. 2d *Limitations of Actions* § 17 (1970); 53 C.J.S. *Limitations of Actions* § 1 (1948).

¹⁸The justification for upholding the repose presumption of limitation statutes is said to be "based in part upon the proposition that persons who sleep upon their rights may lose them." 51 AM. JUR. 2d *Limitations of Actions* § 16 (1970). The broad sweep of such a proposition is probably better characterized by the concept of implied waiver rather than simply the presumed negligence of the plaintiff as is suggested in 53 C.J.S. § 1, *supra* note 17.

¹⁹See *Statutes of Limitations*, *supra* note 4, at 1203-05.

²⁰Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1943).

²¹The term "enterprise liability" in the product context was popularized in a well-known article by Fleming James, Jr.: James, *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). The term, which he attributes to Ehrenzweig, refers to placing the burden for harm caused by defective products on manufacturers as a cost of doing business. The object of such a risk distribution scheme was to "cut down accidents" and administer the losses "in such a way as to minimize the individual and social burden of them." *Id.* at 923. James' paper echoed the principles stated by Justice Traynor several years before in *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring). In 1973, a prominent tort scholar authored a provocative article suggesting that no-fault enterprise liability statutes should be enacted along the lines of no-fault auto insurance and workers' com-

following their allegedly wrongful acts. These entities — product sellers, for example — bear the risks of product-related injury, then spread the costs to society at large through higher prices that can accommodate the cost of liability insurance. Such “pure” risk costs, however, make up only part of the seller’s insurance premium dollar. A substantial balance of the premium covers administrative costs, legal defense costs, and contingency fees that the plaintiff incurs in pursuing a successful but contested claim.²² Additionally, there is an enhanced uncertainty cost that the prudent insurer attaches to risks that actuarially are relatively unpredictable.²³

pensation. These statutes would embrace a wide variety of tort claims (including product liability) for personal injury. O’Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973).

²²There have been a number of estimates of the cost effectiveness of tort litigation, especially with respect to product liability claims. One study places product liability personal injury defense costs at 35 cents per dollar of claim payment, or 26% of the total cost. INSURANCE SERVICES OFFICE, *PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS* 11 (1977). Using the Insurance Services Office defense cost figures and typical contingency fee arrangements, it is reasonable to estimate that successful plaintiffs recover a net amount of about 40% of the total premium dollar. Another study places the plaintiff’s total legal costs at 54% of recovery (77 cents for every 66 cents of recovery). Schwartz, “Historical Overview of Workplace Compensation & Evolution of Possible Solutions,” in *FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS’ COMPENSATION & WORKPLACE LIABILITY* 39, 43 (1981) (citing American Insurance Association study).

Still another figure was derived by dividing the \$234 million in claims paid out in 1979 by the \$1252 million taken in that year by the five top insurance companies. This results in an 18 3/4% net return to claimants. Bendorf, “Broadening the No-Fault Compensation Option,” in *FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS’ COMPENSATION & WORKPLACE LIABILITY* 284, 287 (1981) (citing Product Liability Supplements filed by insurance companies). Although revenue and disbursement figures for the single year 1979 demonstrate very little, they do raise the important and controversial question of investment income. Cost effectiveness calculations must include the time value of the premium dollar. Today’s premium dollar should yield more coverage than for a dollar’s worth of future claims. The interest earned on reserved funds represents a cost that should be assigned to the litigation system.

Another statistic on asbestos-related disease is illustrative. A Rand Corporation study shows that victims who litigated asbestos-related claims in the 1970’s recovered an average of \$35,000, but incurred an average of \$60,000 for legal expenses. Miller, “Drawing Limits on Liability,” *Wall St. J.*, Apr. 4, 1984, at 26, col. 4.

In contrast, the workers’ compensation system probably returns over 60% of the premium dollar. See Comments by M. Markman, Minnesota Insurance Commissioners, in *FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS’ COMPENSATION & WORKPLACE LIABILITY* 112 (1981).

²³See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *FINAL REPORT V-10* (1977) [hereinafter cited as *FINAL REPORT*]. The Task Force found that product liability rate making was highly subjective, that the “result is that most premiums, in the final analysis, amount to ‘informed best guesses’ of the individual underwriter.” *Id.* When actual product liability losses began moving upward after 1976, there were “abrupt upward revisions” in premiums. *Id.* at V-27. The Task Force suggests that “it is reasonable to assume that the insurers, in their own estimates of potential losses, are acting very conservatively in order to avoid underestimating losses.” *Id.*

It can be argued that the probability that a product will cause physical harm because of a defective condition *present in it at time of sale* will decrease the longer the product is used without causing injury.²⁴ Thus, over time, the pure risk of physical harm from original defects may decrease, but the administrative costs, defense costs, and enhanced uncertainty components of the insurance premium are not as likely to decrease as rapidly.²⁵ This is especially so because the often multiple causes of accidents and health impairments involving long-lived products are difficult to distinguish. A good deal of expense, it is argued, is involved in defending — successfully and unsuccessfully — nonmeritorious claims involving multiple causes and products used beyond their useful lives. Eventually, the ratio of these latter components to the pure risk (of original defects) component of the insurance premium may increase to the point at which sellers can argue persuasively that liability insurance for older products eventually becomes a highly inefficient risk spreader and that consumers and users generally will benefit if the actual costs of the rare instances of delayed harm that do occur are permitted to rest where they fall, despite the occasional injustice that may result.²⁶

With the explosion of delayed manifestation cases in recent years,²⁷ the presumption has become less credible that product risks always

²⁴This argument rests on the proposition that an untested product poses safety and health risks no matter how carefully the product is designed, manufactured, and introduced with warnings. Testing prior to general release reduces the risks, and unrestricted use over time in the field is the ultimate extension of testing. Naturally, unforeseeable misuse, later modifications, poor maintenance, and normal wear and tear beyond the useful life of the product, as well as the normal *reasonable* risks associated with the product can all lead to personal injury, but these latter risks are independent of the risk of harm resulting from "original defects." As original defects show up with normal use they are presumably cured, or the product is withdrawn, or more effective warnings are issued. In any event, the argument holds that "original defects" risk should decline dramatically over time.

²⁵See FINAL REPORT, *supra* note 23, at VII-23. "[S]ome underwriters have said that even if old products represent a relative 'handful of losses,' they have had an impact on underwriting judgments far out of proportion to their statistical significance." *Id.*

²⁶The principal justifications for an insured enterprise liability regime are efficient risk distribution, protection of individuals from catastrophic costs which they are unable to bear, and the development of pressures on manufacturers to improve product safety and health performance. See *supra* note 21. In the case of products that behave as postulated in text — generally capital equipment — the argument for cutting off "long-tail" tort claims by repose statutes is persuasive. The argument would be even stronger if workers' compensation systems universally provided adequate benefits for the injured workers whose workplace product tort claims are barred by these repose statutes. This argument in favor of repose statutes is developed more fully in McGovern, *supra* note 4, at 592-600.

²⁷Delayed manifestation injuries from asbestos are expected to number several million. Estimates vary from eight million, *National Cancer Institute and National Institute of Environmental Health Sciences, Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors* 1-2 (draft summary, Sept. 11, 1978), to around 20 million. The number of persons developing asbestos-related diseases each year is not expected to level off until the 1990's. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573,

diminish in time after initial introduction of the products into the stream of commerce.²⁸ Only now are severe illnesses caused by products introduced decades ago becoming manifest.²⁹ Yet this unexpected delayed-effects phenomenon leads to a perverse economic corollary to the earlier argument: because the magnitude and frequency of these delayed losses

580 n.13 (1983).

Some other workplace substances which are having an increasing impact because of delayed manifestation of injuries are formaldehyde, polyvinylchloride (PVC), radiation, and microwaves. The impact of injuries from these substances on the compensation systems could be as great or greater than that from asbestos. Suits arising from exposure to microwaves, which has occurred almost exclusively in the workplace, have been predicted to become the broadest-based product liability litigation ever. Nat'l L.J., Sept. 14, 1981, at 24, col. 1. Formaldehyde, which has been described as ubiquitous, Nat'l L.J., May 10, 1982, at 1, col. 1, is used in a wide variety of ways in the workplace. Use has been especially heavy in the forest-products industry, which uses one-half of the formaldehyde produced, and the textile industry, which uses one-quarter. In all, about 1.4 million people come into contact with formaldehyde solutions in the workplace. Wall St. J., May 21, 1982, at 23, col. 1. The U.A.W., which along with 14 other unions sued OSHA to set stricter exposure standards in factories, claims that as many as one percent of workers exposed at current levels may die of formaldehyde-related cancers. Wall St. J., Mar. 15, 1983, at 1, col. 5. The AFL-CIO cited formaldehyde as a health hazard to workers in beauty salons and barber shops where it is used in sterilizing solutions and in some beauty products. Wall St. J., Feb. 8, 1983, at 1, col. 5.

Almost monthly, new workplace carcinogens and suspected carcinogens are being identified. These include newspaper ink, *see, e.g.*, *Hanna v. Sun Chem. Corp.*, No. C-81-1967 (N.D. Ohio 1981); *Grady v. Sun Chem. Corp.*, No. C-81-1696 (N.D. Ohio 1981), asphalt fumes, Wall St. J., Apr. 27, 1983, at 1, col. 5, and fluorescent lights, Wall St. J., Apr. 12, 1983, at 26, col. 4. Recently it was disclosed that wood-model makers in the auto industry are 50% more likely to develop cancer, although the specific carcinogen has not been identified. Simison, "Cancer Peril Disturbs Wood-Model Makers in the Auto Industry," Wall St. J., Jan. 3, 1983, at 1, col. 6. Even VDT's (video display terminals) have become suspect, and at least nine states are considering legislation to regulate their use. Wall St. J., Mar. 6, 1984, at 1, col. 5.

²⁸It would be disingenuous to claim that the toxicity of substances found in the workplace and the general environment comes as a complete surprise, yet it is fair to state that the toxicity of very low concentrations of many common substances, the harmfulness of relatively brief exposures, the number of substances that have turned out to be carcinogenic, and the great length of undetectable gestation periods have been both surprising and overwhelming.

²⁹*See Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind. Ct. App. 1981), *rev'd*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 460 U.S. 1076 (1983). In *Bunker*, the Indiana Court of Appeals held that a three-year-from-date-of-last-exposure statute of limitations denied occupational disease (asbestosis) claimant Richard Bunker due process of law. The court was persuaded by medical evidence published by Dr. Irving Selikoff demonstrating the delayed manifestation characteristics of asbestosis and mesothelioma. The court noted that a study of "asbestosis insulation workers revealed chest x-ray abnormality in only 10% of those whose exposure began less than ten (10) years before the study" *Id.* at 424-25. Thus, in the case of asbestos-related disease, not only would symptoms of disease not manifest themselves for many years following exposure to asbestos, the onset of disease was in most cases totally undetectable. For an account of the *Bunker* case, *see Leibman & Dworkin, A Failure of Both Workers' Compensation and Tort: Bunker v. National Gypsum Co.*, 18 VAL. U.L. REV. 941 (1984).

are proving to be both huge and unpredictable, the insurance system may not be up to the task of efficiently shifting these costs from users to sellers. That is, no reasonable premium may be sufficient to fund protection for the full range of uncertainties inherent in these toxic tort situations. Thus, it can again be argued that the insured tort system may be an inadequate vehicle for distributing these delayed-effect risks.³⁰

*C. Repose Provisions; "Occurrence-Based" versus
"Accrual-Based" Limitation Legislation*

The foregoing arguments provide the economic rationale for enacting repose statutes such as that embedded in the Indiana Product Liability Act of 1978.³¹ A repose statute cuts off a defendant's exposure to liability a statutory number of years following the defendant's act.³² If that act

³⁰Not only are manufacturers of hazardous materials facing insolvency because of product liability claims, the viability of their insurers is at risk as well. Legal Times, March 30, 1981, at 1, col. 3. It has been estimated that the insurance industry may be liable for \$38.2 to \$90 billion over the next 35 years because of asbestos-related diseases. Wall St. J., June 18, 1982, at 26, col. 3. A few experts have stated that some insurers may collapse because of the number of asbestos suits. Wall St. J., June 14, 1982, at 1, col. 6. The effects on the casualty insurance industry from the delayed manifestation aspects of the Bhopal disaster and related chemical leak incidents is still to be estimated. The newly discovered toxicities mentioned at *supra* note 27 add an additional dimension to the risk distribution problem.

Finally, there is a "snowball effect" at work in the delayed-effects, mass-tort context. A slowly developing situation permits a thorough dissemination of information. Victims are given the opportunity to appreciate and understand their injuries, while the plaintiffs' bar has time to develop expertise, specialization, and cooperative attorney/expert witness networks. The result is that a financial disaster which at first appears contained from the product seller's and defense bar's perspectives may move "out of control." Such a situation was the reason given by an A.H. Robins' spokesperson (Nat'l Public Radio, Aug. 22, 1985) for Robins' filing for Chapter 11 protection on Aug. 21, 1985.

As of June 30, 1985, about 5,100 Dalkon Shield claims were pending; Robins said it expected "a substantial number" of new cases to be filed." Wall St. J., Aug. 22, 1985, at 3, col. 1. As of June 30th, 9,230 claims had been settled, Aetna Insurance Co. had paid \$378.3 million to settle them, and legal fees and other costs for the defendants had totaled \$107.3 million. Sales of the Dalkon Shield were discontinued in the United States in 1974. *Id.*

³¹IND. CODE §§ 33-1-1.5-1 to -8 (1982 & Supp. 1985). Section 5 provides in part: [A]ny product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

³²The 10-year period in IND. CODE § 3-1-1.5-5 was held to be such a repose provision (or outer-cutoff of liability) in *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) (questions certified to the Indiana Supreme Court by the Seventh Circuit Court of Appeals pursuant to IND. R. APP. P. 15(0)).

causes injury occurring after the statutory period has run, no liability can attach to the defendant. Thus, the effect of the statute may be to leave a plaintiff, injured by the wrongful act of another, without a remedy. Such repose provisions covering product sales, medical malpractice, and architect and builder's liability have found favor in a substantial number of jurisdictions.³³

Repose statutes represent a type of "occurrence-based" limitation legislation. Occurrence-based laws cut off liability a statutory number of years following the occurrence of a specific event. The specific event could, for example, be the coronation of a king³⁴ or a workers' compensation claimant's last exposure to asbestos dust.³⁵ Or, in the case of an occurrence-based repose provision, the limitation period would run from the completion of the defendant's act, an act such as the delivery of a defective product,³⁶ the negligent performance of a medical procedure,³⁷ or the erection of a negligently designed or constructed building.³⁸

In contrast, a "true" statute of limitations is "accrual-based." It is generally set by the legislature to begin running when the plaintiff's cause of action accrues.³⁹ Such a concept would appear to protect all but slothful plaintiffs who fail to pursue their rights in a diligent and timely manner.⁴⁰ However, in tort law, determining the moment of accrual is a matter that can require judicial interpretation. It is this problem that provides the principal subject matter of this Article.

³³For a discussion of these state statutes and their constitutionality, see McGovern, *supra* note 4, at 600-20, 622-31; Leibman & Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L. J. 289, 349-58 (1985). See also Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745 (1982) (discussing the value of enacting such a statute in New York).

³⁴As early as 1236, statutes were enacted barring real property claims based on seisin prior to the coronation of Henry II. *Statutes of Limitations*, *supra* note 4, at 1177 (citing 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 81 (2d ed. 1898)).

³⁵See, e.g., IND. CODE § 22-3-7-9(f)(4) (1982 & Supp. 1985). Section 9(f)(4) provides that no compensation shall be payable for disablement 20 years after the date of the last exposure to asbestos dust. For a discussion of occupational disease limitation statutes, see Leibman & Dworkin, *supra* note 33.

³⁶See, e.g., IND. CODE § 33-1-1.5-5 (1982 & Supp. 1985) (quoted at *supra* note 31); OR. REV. STAT. § 30.905 (1981).

³⁷See, e.g., IND. CODE § 16-9.5-3-1 (1982); IOWA CODE § 614.1 (1950 & Supp. 1985).

³⁸See, e.g., IND. CODE § 34-4-20-1 (1982 & Supp. 1985); TENN. CODE ANN. § 28-3-202 (1980).

³⁹*Statutes of Limitations*, *supra* note 4, at 1200.

⁴⁰See *Hansen v. A.H. Robins Co.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). "There are two conflicting public policies raised by the statute of limitations: '(1) That of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained.' " *Id.* at 554, 335 N.W.2d at 580 (quoting *Peterson v. Roloff*, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 705 (1973)).

D. Determining the Moment of Accrual

Arguably, an action in tort will lie as soon as a plaintiff's protected interest has been invaded by the defendant's wrongful act.⁴¹ Under this interpretation, an initial exposure by a user to a deleterious substance or defective device sold by the defendant might be sufficient to start the tort statute of limitations running. This analysis would hold even if no symptoms of harm were manifest or evidence of injury were discoverable during the limitations period. Such an accrual rule, however, produces harsh results when plaintiffs become aware that they have had causes of action only after the statute of limitations has run on them. For this reason, an increasing number of jurisdictions now hold that a tort cause of action accrues only when injury is discoverable.⁴²

Prior to the 1981 case of *Shideler v. Dwyer*,⁴³ Indiana law was undecided on this point. *Shideler*, however, appeared to reject firmly the discovery rule in tort cases. Although *Shideler* was a legal malpractice case, its accrual rule was applied under Indiana law to bar the claims of plaintiffs in the delayed manifestation asbestosis case of *Braswell v. Flinkote Mines, Ltd.*⁴⁴ Subsequently deciding that the factual contexts of continuously developing personal injury and legal malpractice were sufficiently dissimilar to merit identical treatment, the Indiana Supreme Court adopted a liberal, but limited, discovery rule in *Barnes v. A.H. Robins Co.*,⁴⁵ to govern delayed manifestation personal injury cases.

This Article will first examine the *Barnes* case.⁴⁶ Next, the precedents leading up to *Shideler v. Dwyer* will be reviewed.⁴⁷ The *Shideler* case and the "impact rule" adopted in it will be discussed,⁴⁸ and the effect of *Shideler* on subsequent product liability cases prior to *Barnes* will be analyzed.⁴⁹ Several collateral developments relevant to Indiana tort stat-

⁴¹This view is followed primarily in cases "where suit could be maintained regardless of damage—as with breach of contract and most intentional torts But if harm is deemed the gist of the action, the occurrence of harm marks the beginning of the period." *Statutes of Limitations*, *supra* note 4, at 1200-01. To apply the rule to negligence or strict liability cases where damages are an essential element of the plaintiff's case requires equating the "invasion" or "impact" with "harm," "injury," or "damage." One way to justify such a position is to suggest that plaintiffs are free to sue upon impact for damages that they can prove *will* occur. The problem with such a position is that it can work only by hindsight. If harm never develops from the impact, no cause of action matures, and, therefore, no accrual statute of limitations commences to run.

⁴²See cases cited in *Barnes v. A.H. Robins Co.*, 476 N.E.2d at 87.

⁴³275 Ind. 270, 417 N.E.2d 281 (1981), *vacating and remanding*, 386 N.E.2d 1211 (Ind. Ct. App. 1979).

⁴⁴723 F.2d 527 (7th Cir. 1983).

⁴⁵476 N.E.2d 84 (Ind. 1985).

⁴⁶See *infra* notes 51-68 and accompanying text.

⁴⁷See *infra* notes 69-114 and accompanying text.

⁴⁸See *infra* notes 115-35 and accompanying text.

⁴⁹See *infra* notes 136-84 and accompanying text.

utes of limitations will then be reviewed briefly.⁵⁰ Without taking a position on the virtue of repose statutes, this Article will conclude that, because the controlling case, *Shideler v. Dwyer*, is conceptually flawed with respect to accrual-based statutes of limitations, the limited accrual exception adopted in *Barnes* is likely to be expanded in Indiana to cover the accrual of tort claims generally.

II. THE *Barnes* CASE

*Barnes v. A.H. Robins Co.*⁵¹ was a consolidation of two cases that reached the Supreme Court of Indiana by certification of a question of state law from the United States Seventh Circuit Court of Appeals.⁵² This was the procedure used when, in *Dague v. Piper Aircraft Corp.*,⁵³ the constitutionality of the repose section of the Indiana Product Liability Act of 1978 was upheld.⁵⁴

In *Barnes*, the federal courts were required to rule on the accrual date of a personal injury tort case under Indiana law "when the injury to the plaintiff is caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance."⁵⁵ The answer to the question would establish when two Indiana statutes of limitations would begin running in protracted exposure, delayed manifestation cases.⁵⁶

At the trial level, the federal district court provided its answer to the question at issue in both consolidated cases by granting summary judgment to the defendant, A.H. Robins Co.⁵⁷ The trial court rejected plaintiff's arguments that accrual of their actions did not occur until they discovered the causal connection between their injuries and alleged defects in the Dalkon Shield intrauterine device that was manufactured by the defendant and used by the plaintiffs.

⁵⁰See *infra* notes 185-232 and accompanying text.

⁵¹476 N.E.2d 84 (Ind. 1985). For an explanation of the subsequent history of the *Barnes*, case, see *supra* note 1.

⁵²See IND. R. APP. P. 15(0).

⁵³275 Ind. 520, 418 N.E.2d 207 (1981) (answering four questions certified to the Indiana Supreme Court by the Seventh Circuit Court of Appeals under IND. R. APP. P. 15(0)). For discussions of the *Dague* case, see Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 22-23 n.133; Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 290-93 (1982).

⁵⁴IND. CODE §§ 33-1-1.5-1 to -8 (1982).

⁵⁵476 N.E.2d at 85.

⁵⁶A protracted disease tort case can be governed either by the Indiana Product Liability Act limitations provision, IND. CODE § 33-1-1.5-5 (1982 & Supp. 1985), or by the general personal injury statute of limitations, *id.* § 34-1-2-2. The certified question from the Seventh Circuit referred specifically to both of these statutes. 476 N.E.2d at 85.

⁵⁷476 N.E.2d at 85.

One of the plaintiffs, Lahna Barnes, had her Dalkon Shield inserted on July 18, 1972.⁵⁸ She suffered pelvic inflammatory disease within two weeks of insertion. The device was removed a few weeks later. Thereafter she suffered a series of injuries, but it was not until 1981 that she learned from the TV program, "60 Minutes," the "dangers and defective nature of the Dalkon Shield." She filed her complaint against Robins on August 21, 1981, over two years, but less than ten years, following delivery of the product to her.

Sharon Neuhauser, the other plaintiff, had a Dalkon Shield inserted on May 19, 1972. She became pregnant, suffered a miscarriage in June of 1974, and learned she had cervical cancer in 1975. As a result of the disease, Neuhauser was forced to undergo a series of severe operations. She also learned of the toxic nature of the Dalkon Shield from the "60 Minutes" program and filed suit August 6, 1981.

At the outset, it should be noted that the two cases present legally distinguishable facts. Barnes clearly suffered noticeable physical injury within two years of the insertion of her Dalkon Shield. Her theory for tolling the statutes of limitations was that she was unaware of a causal connection between the defectiveness of the shield and her inflammatory disease until much later. On the other hand, if Neuhauser suffered injury during the two-year period following the insertion of her shield, there was probably no reasonable way for her to have discovered that fact prior to the manifestation of her symptoms which occurred after the limitations period had run.⁵⁹ While it is true that she became pregnant before the two years were over, no contraceptive method currently can be relied on to be one hundred percent effective. An atypical pregnancy without complications would probably not have been considered actionable. The cases of both plaintiffs apparently rested on the issue of safety, rather than effectiveness.⁶⁰

⁵⁸The facts of the two consolidated cases, brought by plaintiffs, Lahna Barnes and Sharon Neuhauser, are set out at 476 N.E.2d at 84-85.

⁵⁹Presumably, the *first symptom* of physical harm to Neuhauser attributable to the Dalkon Shield occurred when she suffered a miscarriage in June, 1974, more than two years after insertion. The harm itself, *i.e.*, physical changes in her body, may possibly have commenced, undetected, immediately following insertion of the shield.

⁶⁰Whether a patient has a "wrongful pregnancy" claim against a manufacturer of a birth control device which fails to prevent pregnancy generally is a separate issue from that of the device's safety. But if the plaintiff does bring a wrongful pregnancy claim, a discovery-based statute of limitations would presumably run from actual or constructive notice of the pregnancy. See discussion of the *Tolen* case, *infra* notes 149-60 and accompanying text. Health impairments, however, would presumably represent a separate claim, and a discovery-based statute of limitations to govern it would presumably run from notice of the physical injury and its causal nexus to the product defect. A plaintiff bringing both claims in the same action should not be bound to a single statute of limitations on the ground that to do otherwise is "action-splitting." See *infra* notes 89-91 and accompanying text.

Because of the liberality of the supreme court's discovery rule, both plaintiffs were given the chance to recover, but the court's decision might have been otherwise. The court could have precluded recovery for plaintiff Barnes on the ground that she had suffered ascertainable damages within the two-year statutory period while Neuhauser had not. Instead, the court ruled that, in protracted exposure situations, damages are not ascertainable until the plaintiff discovers, or through due diligence should discover, the cause of the injury. In these situations, the plaintiff's action does not accrue, and the statute of limitations does not begin to run, until the causal nexus to the product is reasonably discoverable.⁶¹

The court reaffirmed its deference to the legislature's power to set a starting point and period of duration for any statute of limitations, but it held that when the legislature provides that the starting point of the limitation period is when the "cause of action accrues," it is within the power of the courts to determine the time of accrual.⁶² Thus, when the Indiana Supreme Court was specifically asked in *Barnes* to set the time of accrual for protracted exposure cases, the majority — unlike the Wisconsin Supreme Court which was presented with the identical question by the Seventh Circuit Court of Appeals⁶³ — decided to limit its discovery rule to claims "where the misconduct is of a continuing nature and is concealed,"⁶⁴ rather than to "all tort claims."⁶⁵

The Indiana court rationalized its restriction by stating that going beyond the certified question would be "issuing an advisory opinion."⁶⁶ The court also suggested that it was currently unwilling to overrule its decision in *Shideler v. Dwyer*⁶⁷ where personal property rather than personal injury was involved, the action complained of was unconcealed, and the harmful act was a single rather than a continuing occurrence. Also, in *Shideler*, the plaintiff was a beneficiary rather than the client in privity with the defendant lawyer being charged with legal malpractice.⁶⁸

⁶¹476 N.E.2d at 87-88. The supreme court stated that it could make no determination as to the merits of the two causes of action; that was left to the federal courts. *Id.* at 88. Yet, given the undisputed facts of the two cases, the court could easily have narrowed its answer to the certified question so as to have effectively barred Barnes on the ground that she failed to file her claim within two years of suffering "ascertainable damages."

⁶²*Id.* at 85.

⁶³See Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

⁶⁴476 N.E.2d at 87 (quoting *Shideler v. Dwyer*, 275 Ind. 270, 417 N.E.2d 281 (1981)).

⁶⁵476 N.E.2d at 87.

⁶⁶*Id.*

⁶⁷275 Ind. 270, 417 N.E.2d 281 (1981).

⁶⁸It has been suggested that *Shideler*'s heightened duty to her client, as compared to that owed her client's beneficiary, rests on the fiduciary relationship between lawyer and client. See *Tolen v. A.H. Robins Co.*, 570 F. Supp. 1146, 1150 n.2 (N.D. Ind. 1983). However, the existence, or lack, of privity between the parties would alone appear to provide sufficient justification for disparate treatment. For a discussion of *Shideler*, see *infra* notes 115-35 and accompanying text.

Although the reluctance of the court to provide relief to the remote third party in the *Shideler* context is understandable, the broad holding of the case rests on shaky ground and will continue to produce mischievous results if allowed to stand as judicial interpretation. The “ascertainable damages” rule from the line of cases relied upon in *Barnes* for tort accruals is simple and reasonable. Deviations from it probably should be left to the legislature.

III. EARLY PRECEDENTS

The *Barnes* court set forth the Indiana position on accrual as follows: “[T]he rule in Indiana has been generally understood to be that a cause of action accrues when the resulting damage of a negligent act is ascertainable or by due diligence could be ascertained,” the court acknowledging that it remained to be settled “how ascertainable a particular injury was and what standard would be applied as to what is reasonably ascertainable.”⁶⁹ The “most notable case,” the court stated, “is that of the *Board of Commissioners of Wabash County v. Pearson*.”⁷⁰

The *Pearson* opinion said nothing about damages being ascertainable, but the *Pearson* court did hold that a cause of action does not accrue until the plaintiff is injured.⁷¹ *Pearson* involved a bridge that was negligently built in 1871, but which did not collapse until 1884. The plaintiff was physically injured in the collapse. The defendants argued that the statute of limitations began to run when the bridge was completed, a result which would have been true of a pure repose statute. The court pointed out, however, that “[t]he two elements of the appellee’s cause of action are the legal injury and the resulting damages,” and the personal injury statute of limitations begins running only when “the right of action accrue[s].”⁷²

A. Cases Supporting the “Ascertainable Damages” Rule

The requirement that damages must be ascertainable first appeared in an Indiana Supreme Court case in *Montgomery v. Crum*⁷³ as a parenthetical dictum. This case involved the tortious alienation of a daughter’s affections by the plaintiff’s divorced husband and the husband’s family. The defendants had spirited the child away and hidden her for over nine years. They argued that the mother’s action for damages was barred by the two-year statute of limitations “‘for injuries to person or character.’”⁷⁴ The court held that the defendants’ acts constituted

⁶⁹476 N.E.2d at 86.

⁷⁰*Id.* (citing 120 Ind. 426, 22 N.E. 134 (1889)).

⁷¹120 Ind. at 428, 22 N.E. at 135.

⁷²*Id.*

⁷³199 Ind. 660, 161 N.E. 251 (1928).

⁷⁴*Id.* at 675, 161 N.E. at 257 (quoting the statute of limitations).

a continuing wrong so that "the statute of limitations will not begin to run until there is a cessation of the overt acts constituting the wrong."⁷⁵ The court also stated:

The two-year statute of limitations will not begin to run as a shield against the consequences of wrongful acts until the wrongdoer thereby accomplishes an injury to the person of another, for which the law allows indemnity in the form of damages (that is to say, *damages susceptible of ascertainment*), for not until then would the cause of action accrue.⁷⁶

In the *Montgomery* case, however, damages to the plaintiff were readily ascertainable by the plaintiff from the very beginning of her attempts to recover her daughter.

The interesting point made by this case is that mere notice of injury is not enough to trigger the running of a statute of limitations that will act to bar the plaintiff's cause of action. Even the plaintiff's knowledge of the cause of injury may be insufficient. For the relevant statute to run under the *Montgomery* holding, the wrongful acts of the defendant must be *completed*, despite the obvious fact that the plaintiff could have maintained a lawsuit as soon as initial injury was suffered. For that reason, it is probably better to consider a series of wrongful acts as a multiple, repeating tort rather than as a single, continuing one. Thus each succeeding act will trigger the statute of limitations, but only the final act in the series of wrongful acts will begin the limitations period that might effectively bar the plaintiff's action.

The "ascertainable damages" rule was applied in the diversity case of *Gahimer v. Virginia-Carolina Chemical Corp.*⁷⁷ Allegedly defective fertilizer was delivered to the plaintiffs on April 5, 1952. Crops were planted prior to May 24, 1952. Sometime after May 25th, the plaintiff discovered that his crops were damaged. He filed suit May 24, 1954. The defendants argued that the two-year statute of limitations had begun running upon the delivery of the fertilizer on April 5, 1952; the plaintiff countered that no cause of action accrued until his discovery of injury after May 24, 1952. The defendants cited cases which acknowledged that, while injury to the plaintiff was necessary for an action's accrual, the plaintiff's discovery of the injury was not.⁷⁸ The plaintiff relied primarily on the *Montgomery v. Crum* language requiring that damages must be "'susceptible of ascertainment.'" ⁷⁹ The court held for the plaintiff on this issue, stating that "[t]his date can not and need not

⁷⁵*Id.* at 679, 161 N.E. at 259.

⁷⁶*Id.* (emphasis added).

⁷⁷241 F.2d 836 (7th Cir. 1957).

⁷⁸*Id.* at 839 (citing *Fidelity v. Jasper Furniture Co.*, 186 Ind. 566, 177 N.E. 258 (1917); *Craven v. Craven*, 181 Ind. 553, 103 N.E. 333 (1913)).

⁷⁹*Id.* at 840 (quoting 199 Ind. 660, 161 N.E. 251).

be determined with certainty. It is sufficient for our purpose that it was after the corn came up and was within the two-year limitation period.”⁸⁰

There is one additional fact of significance to be noted from the *Gahimer* case. At one point, more than two years earlier than the filing of his claim, the plaintiff noticed that the corn in one of his fields “was coming up but not ‘naturally and normally.’ ”⁸¹ Presumably plaintiff was then on notice that injury had occurred. Yet “[t]here [was] no proof that Gahimer had knowledge or any reason to think that the corn in any of the fields had been damaged by use of defendant’s fertilizer.”⁸² The court of appeals evidently believed that “damages susceptible of ascertainment” meant that plaintiff must have some reasonable opportunity to acquire knowledge of a causal nexus between his injury and the defendants’ product.

Gahimer and *Montgomery* were relied upon in *Essex Wire Corp. v. Hilt Co.*⁸³ In that case, the defendant permitted a piece of canvas to be drawn into a motor owned by the plaintiffs. The canvas was immediately withdrawn, and no apparent harm to the motor was noted at the time. Fifteen months later, the motor failed because some of the canvas had in fact been left inside. The court held that the statute of limitations ran from the date the motor failed, because only then were the damages susceptible of ascertainment.⁸⁴ It was clear, however, that *undiscovered* injury to the motor was occurring steadily during the entire fifteen months following the defendant’s negligent act.

In *Withers v. Sterling Drug, Inc.*,⁸⁵ the federal district court acknowledged the ascertainable damages rule applied in the *Gahimer* case,⁸⁶ but held that once the plaintiff has ascertained that some damages exist, the cause of action accrues and the statute of limitations begins to run, even though the plaintiff is not aware, nor can reasonably be made aware, that far greater damages will later be forthcoming from the defendant’s act.⁸⁷ *Withers* involved the drug Aralen. The plaintiff suffered what she thought was reversible eye damage and, therefore, filed no claim. Several years later she learned that the damage was permanent. The court held that she was barred by the two-year statute of limitations

⁸⁰*Id.* at 840.

⁸¹*Id.* at 839.

⁸²*Id.*

⁸³263 F.2d 599 (7th Cir. 1959).

⁸⁴*Id.* at 602.

⁸⁵319 F. Supp. 878 (N.D. Ind. 1970).

⁸⁶*Id.* at 880.

⁸⁷*Id.* at 881. Note that the defendant’s conduct described here is a single act: the delivery of the defective product. While the *harm* that resulted may be characterized as continuing or repeating, the defendant’s *act* is not. Thus, this situation is distinguishable from the defendant’s conduct in *Montgomery v. Crum*, 199 Ind. 660, 161 N.E. 251 (1928) (discussed *supra*, notes 73-76 and accompanying text), which involved a series of acts.

which began to run when she first learned that the drug had adversely affected her.⁸⁸

The *Withers* holding, which is supported by substantial authority,⁸⁹ can lead to anomolous results. Once a plaintiff suffers mild symptoms, the claim must be filed within the limitations period or be barred. If the claim is filed and the plaintiff recovers, any subsequent damages flowing from the same act will not be actionable.⁹⁰ Thus, a plaintiff

⁸⁸319 F. Supp. at 881.

⁸⁹The prohibition against action-splitting derives from principles of *res judicata*. If the plaintiff receives a judgment of damages resulting from the wrongful act of the defendant, an attempt later to reassert the same cause of action for additional damages will be said to have been *merged* in the prior judgment. *Rush v. City of Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958), *cert. denied*, 358 U.S. 814 (1958); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 824 (1952). The plaintiff may argue that the defendant's act gave rise to two distinct causes of action requiring different evidence in each case. Such is the position of the plaintiff in cases like *Withers*, in which a drug, substance, or device is found to produce *temporary* damage followed unexpectedly some substantial time later by *permanent* damage. Upon occurrence of the temporary injury — or in discovery rule states, upon *discovery* of the temporary injury — the plaintiff must bring suit within the statutory limitation period or be thereafter barred. While it is true that the plaintiff can theoretically recover for any prospective damages that can be proved, those damages are likely to be at best "speculative." Or, as in *Withers*, they may be unanticipated. Given this situation, the plaintiff may assert that justice requires treating the action for permanent injury as distinct from the earlier one for temporary damage.

In *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980), the plaintiff suffered what he believed to be reversible eye damage in 1960. There was some reason to believe at the time that MER/29, a drug manufactured by the defendant, was responsible. There was also some evidence that the plaintiff may have known or should have suspected the link. Because plaintiff believed his injury was temporary, he filed no action in 1960. In 1976, the plaintiff suffered severe permanent eye damage. The defendant's motion for summary judgment on the ground that the plaintiff's later suit was barred by the statute of limitations was granted. In reversing, the California Court of Appeals recognized the authority of the rule against action-splitting, *id.* at 323-24, 164 Cal. Rptr. at 595, but it held that advances in science and technology required the fashioning of new remedies to meet changing needs. With defective products, the court noted that the plaintiffs' needs in delay cases could be accommodated without excessively prejudicing the defendants' opportunity to marshal evidence. The court pointed out that "[t]he cataract-causing potential of MER/29 became known to defendants in 1960 or 1961. They obviously have had an opportunity to gather evidence on the subject while the facts were as fresh as they could be. In addition, they have had two decades to refine the result of their researches." *Id.* at 325, 164 Cal. Rptr. at 596. In addition, the court observed, exceptions have been recognized to the rule of merger in nuisance cases, progressive occupational disease cases, and in the RESTATEMENT (SECOND) OF JUDGMENTS 61.2 (Tent. Draft no. 5 (1982)), where an exception is permitted when "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason" *Id.* at 327, 164 Cal. Rptr. at 597 (quoting the Restatement). See generally *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 828-31 (1952) (for "Countervailing Policies" supporting exceptions to the principles of merger).

⁹⁰See generally *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818 (1952).

who remains completely ignorant of latent injury until it erupts into severe symptoms is in a better position to recover complete compensation than the party who receives notice of a slow-developing disease early in its development. Yet, it is the cases in which the parties are completely taken by surprise, long after severe undiscovered damage has taken place, that are most troublesome for defendants and the courts.⁹¹

B. Cases Denying the "Ascertainable Damages" Rule

There is early Indiana authority rejecting the rule that damages must be susceptible of ascertainment before a statute of limitations will begin to run. In *Craven v. Craven*,⁹² the Indiana Supreme Court stated that "[t]he fact that a person entitled to an action has no knowledge of his right to sue, or the facts out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns of his rights there-

⁹¹The *Withers* and *Martinez-Ferrer* cases illustrate the interworkings of limitation and res judicata principles to bar meritorious cases. In situations where the defendant receives reasonably prompt notice that its products may be causing harm, one or the other of these principles should probably give way to accommodate the plaintiffs' legitimate right to relief. Either the statute of limitations should be tolled until the *extent* of damages is ascertainable, or additional causes of action should be permitted where justice requires. Such an exception to the preclusion rules is permitted in cases involving "continuing or recurrent wrong." RESTATEMENT (SECOND) OF JUDGMENTS § 26(e) (1982). The same reasoning would seem to apply when the *wrong* is a single act, but the *harm* is recurrent or continuing. These options are of course irrelevant when the late manifestation of harm takes both parties by surprise.

Following the Survey Period, *Miller v. A.H. Robins Co.*, 766 F.2d 1102 (7th Cir. 1985), was decided. In *Miller*, the plaintiff suffered a pelvic inflammation which she was told *might* have been caused (among other things) by her Dalkon Shield. Presumably, because she expected the temporary inflammation to be the full extent of her damages, and because the causation possibilities were presented to her as being highly uncertain, she neither brought suit nor launched an investigation as to the definite source of her inflammation. Six years later she discovered that she was infertile, and she was then advised by her physician that her inflammation and infertility were caused by the shield. In *Miller's* subsequent lawsuit against Robins, the district court granted the defendant's summary judgment motion. The court of appeals affirmed, ruling that *Miller* was barred two years after she was told of the possible link of her inflammation to the Dalkon Shield. (It is not unlikely that Robins may also have been placed on notice during *Miller's* earlier inflammation that their product was involved.) Yet, if there had been no early warning, *i.e.*, no pelvic inflammation, *Miller*, under the *Barnes* discovery rule, would not have been barred. Such a policy encourages a plaintiff to avoid obtaining *all* knowledge of the causal nexus of a product to the illness (or at least to claim such ignorance) until a lawsuit is definitely contemplated. Rather than encouraging due diligence in obtaining information while it is fresh, the practical effect of the rule against action-splitting in a discovery jurisdiction could be either the encouragement of dissembling or the deliberate avoidance of knowledge. See *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d at 319 n.4, 164 Cal. Rptr. at 592 n.4.

⁹²181 Ind. 553, 103 N.E. 333 (1913).

under.”⁹³ In *Fidelity & Casualty Co. v. Jasper Furniture Co.*,⁹⁴ the court ruled that “[a] cause of action accrues, so that limitations begin to run, at the moment its owner has a legal right to sue on it”⁹⁵ In both of these cases involving property loss, the limitation periods were substantial (twenty and ten years, respectively), and the failure of the plaintiffs to acquire the requisite knowledge of their claims was due either to their own lack of vigor or to the carelessness of third parties. Because neither claim was in tort, policy issues and interests relevant to property and contract law also had to be accommodated in both actions.⁹⁶

In *French v. Hickman Moving & Storage*,⁹⁷ the plaintiff alleged the defendants had converted her personal property that she had bailed to them for storage. Plaintiff filed suit for conversion two and a half years after the sale [conversion] of her goods by the defendants. The Indiana Court of Appeals ruled “that the statute [of limitations] commences to run when the injurious action occurs though the plaintiff may not learn of the act until later.”⁹⁸ In the case of conversion, “the injury to her property occurred when the property was converted and the statute of limitations started to run at that time. . . . Notice to the plaintiff was therefore immaterial.”⁹⁹

The intentional torts for the most part have their roots in trespass.¹⁰⁰ Historically, trespass involved direct, forcible invasion of protected interests, whether to the person or to property of the plaintiff.¹⁰¹ Delayed injurious effects resulting from a defendant’s act were not actionable until the later development of trespass on the case.¹⁰² It is not surprising, therefore, that statutes of limitations applied to intentional conduct, even today, should not provide for notice, discovery, or ascertainable damages with the sole exception for overt acts of fraudulent concealment by the defendant.¹⁰³ The rationale is that a plaintiff generally will, or should, be promptly aware of the kinds of harm to person or property that

⁹³*Id.* at 559, 103 N.E. at 335 (quoting *State v. Walters*, 31 Ind. App. 77, 66 N.E. 182 (1903) (emphasis supplied by the *Craven* court)).

⁹⁴186 Ind. 566, 117 N.E. 258 (1917).

⁹⁵*Id.* at 568, 117 N.E. at 258.

⁹⁶“If the defendant’s conduct in itself invades the plaintiff’s rights, so that suit could be maintained regardless of damage—as with a breach of contract and most intentional torts—the statute commences upon completion of the conduct.” *Statutes of Limitations*, *supra* note 4, at 1200-01. The same observation would apply to cases of adverse possession and other invasions of property rights.

⁹⁷400 N.E.2d 1384 (Ind. Ct. App. 1980).

⁹⁸*Id.* at 1388.

⁹⁹*Id.*

¹⁰⁰PROSSER & KEETON, *THE LAW OF TORTS* 30 (5th ed. 1984).

¹⁰¹*Id.* at 29.

¹⁰²*Id.*

¹⁰³*See Statutes of Limitations*, *supra* note 4, at 1217-19.

occur under the rubric of the intentional, generally trespass-based torts.¹⁰⁴

In *Cordial v. Grim*,¹⁰⁵ the plaintiff alleged that he had lost his workers' compensation claim as a result of his attorneys' malpractice. His pro se complaint against his lawyers, however, was brought more than two years after the workers' compensation claim was denied for the first time and also more than two years after his relationship with his attorneys had terminated. In opposing the attorneys' motion for summary judgment which was based on the ground that the statute of limitations had run, the plaintiff presented two closely related arguments. First, he contended "that the statutes of limitation considered hereinabove should commence to run only upon the actual discovery of a right of action by the injured party."¹⁰⁶ Second, he contended "that his causes of action did not accrue until he suffered both an injury to his property and damages, and that he did not suffer damages until his second appeal to the [Industrial] Board was denied"¹⁰⁷

The court rejected the plaintiff's first argument which asked for application of a discovery rule. The court cited *Toth v. Lenk*,¹⁰⁸ a medical malpractice case governed by the Indiana malpractice statute which requires the claim to be " 'filed within two [2] years from the date of the act, omission or neglect complained of.' "¹⁰⁹

The *Toth* court distinguished the malpractice limitation statute from the general personal injury limitations statute as follows:

The statute thus differs from the general statute governing personal injuries . . . which requires that such actions be commenced within two years "after the cause of action has accrued." Clearly the choice of terminology in the malpractice statute is more restrictive. It is intended to avoid, in medical malpractice cases, the impact of that line of case law holding that "accrual of the action" phraseology extends the time for commencing an action where either the injury or damage (essential elements of

¹⁰⁴See *supra* note 96. Historically, conversion evolved from the common law action of trover which was originally an action on the case. Trover developed as a substitute action for trespass to chattels. In trover, the plaintiff could refuse the tendering back of the chattel, because the gist of the tort was the defendant's intentional assertion of dominion and control over the goods. The modern tort of conversion requires a serious interference with, and denial of, the rights of the true owner. Although conversion has its origin in case, it is definitely an intentional tort clearly distinct from negligence. PROSSER & KEETON, *supra* note 100, at 88-93.

¹⁰⁵169 Ind. App. 58, 346 N.E.2d 266 (1976).

¹⁰⁶*Id.* at 69, 346 N.E.2d at 273.

¹⁰⁷*Id.* at 70, 346 N.E.2d at 273.

¹⁰⁸164 Ind. App. 618, 330 N.E.2d 336 (1975).

¹⁰⁹*Id.* at 620, 330 N.E.2d at 338 (quoting IND. CODE ANN. § 34-4-19-1 (Burns 1971)).

the tort) do not occur until long after the act or omission which gave rise to them.¹¹⁰

In any event, the general personal injury statute of limitations was not at issue in *Toth v. Lenk*, nor was it in *Cordial v. Grim*. The *Cordial* court decided that the occurrence-based malpractice statute of limitations, heretofore applied only in medical malpractice cases, would be applicable to legal malpractice cases as well.¹¹¹

With respect to *Cordial's* second argument — that he had suffered no damages until the Industrial Board's denial of his claim — the court ruled that *Cordial* had suffered damages sufficient to maintain an action for malpractice when his original workers' compensation benefit "was terminated adversely to him with prejudice to his ability to maintain any further proceedings thereon."¹¹²

These, then, were the Indiana authorities when, in 1981, another legal malpractice case, *Shideler v. Dwyer*,¹¹³ was presented to the Indiana Supreme Court. *Shideler* required construction of the accrual-based, general tort statute of limitations for injury to person or property.¹¹⁴ The cases to that point were uniform in requiring that there be damages in order for a cause of action to accrue and for limitation statutes based on accrual dates to commence running. While there were a few non-physical injury cases to the contrary, the weight of Indiana authority also held that damages suffered by a plaintiff must be "susceptible of ascertainment."

IV. *Shideler v. Dwyer*

The plaintiff *Dwyer* was a disappointed beneficiary under *Moore's* will.¹¹⁵ *Shideler*, *Moore's* lawyer, had drafted a will provision which directed an officer of a corporation of which *Moore* was a major stockholder, and *Dwyer* an employee, to pay *Dwyer* a monthly retirement benefit of \$500. After *Moore* died, *Dwyer* retired, but the corporation denied her claim to the benefit promised her by the testator. After *Dwyer's* petition for construction of the will was decided adversely to her by the Marion County Probate Court, she filed suit against *Shideler* and *Shideler's* law firm for malpractice. *Shideler's* motion for summary judgment, on the ground that the relevant statute of limitations had

¹¹⁰*Id.* at 620-21, 330 N.E.2d at 338.

¹¹¹169 Ind. App. at 67, 346 N.E.2d at 272.

¹¹²*Id.* at 70, 346 N.E.2d at 273.

¹¹³417 N.E.2d 281 (Ind. 1981).

¹¹⁴IND. CODE § 34-1-2-2 (Supp. 1985).

¹¹⁵417 N.E.2d at 284. For an analysis of the *Shideler* case, see MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981).

run, was denied.¹¹⁶ Shideler appealed the order which was affirmed by the Indiana Court of Appeals. Subsequently, Shideler's petition for transfer was granted by the Indiana Supreme Court.¹¹⁷

The supreme court ruled that Dwyer's action was governed, not by the malpractice statute of limitations found applicable in *Cordial v. Grim*,¹¹⁸ but rather by the general tort statute of limitations¹¹⁹ for injury to person or personal property¹²⁰ which commences running when the plaintiff's cause of action accrues.¹²¹ The primary issue remaining for the court was when Dwyer's action accrued.

The plaintiff contended that the statute commenced running when the probate court decreed that the gift to her was void.¹²² The defendants argued "that any injury caused by them must have occurred no later than the date of Moore's death, after which time Moore's Will could not be changed; or the date the Will was admitted to probate, at which time the Will became an effective legal instrument."¹²³ Dwyer's argument was that until the probate court's decision, "she sustained no damage from the defendants' acts or omissions because the court conceivably could have declared the clause to be valid."¹²⁴ The gist of Dwyer's position was that until her claim under the will was denied, any damages she was later to suffer as a result of the malpractice were completely unascertainable.

The supreme court held for Shideler. It ruled that Dwyer's malpractice action accrued when the testator died.¹²⁵ The court could have rested this holding on the ground that Dwyer had sufficient facts at that time to ascertain that the then operative will provision would be declared void and, therefore, that Shideler could immediately be held culpable for malpractice. In other words, when the will became operative, Shideler's allegedly incompetent drafting of the gift provision could have been perceived by Dwyer as an actionable invasion of her property interest in the bequest.

Instead, the court adopted a much broader holding: "For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the

¹¹⁶417 N.E.2d at 283.

¹¹⁷*Id.*

¹¹⁸169 Ind. App. 58, 346 N.E.2d 266 (1976). See *supra* notes 105-12 and accompanying text.

¹¹⁹IND. CODE ANN. § 34-4-19-1 (Burns 1971).

¹²⁰IND. CODE ANN. § 34-1-2-2 (Burns 1971).

¹²¹417 N.E.2d at 288.

¹²²*Id.*

¹²³*Shideler v. Dwyer*, 386 N.E.2d 1211, 1215 (Ind. Ct. App. 1979), *rev'd*, 417 N.E.2d 281 (Ind. 1981).

¹²⁴417 N.E.2d at 288.

¹²⁵*Id.* at 290.

damage be known or ascertainable but only that damage has occurred.”¹²⁶ This is a ruling that requires some scrutiny. The requirement for accrual would appear to be merely that there be an occurrence of damage, whether or not it is ascertained or is even ascertainable by the plaintiff. The court is also suggesting that very slight damage is sufficient for accrual.¹²⁷ To determine exactly what the court had in mind, it is necessary to consider the New York case of *Schmidt v. Merchants Dispatch Transport Co.*, on which the majority relied and from which it quoted extensively.¹²⁸

In *Schmidt*, the defendants caused the plaintiffs to breathe in a deleterious dust from which the plaintiffs later developed respiratory disease. The *Schmidt* court held that there had been an actionable tortious invasion of the plaintiffs’ persons the moment they inhaled the first speck of dust. Despite the fact that New York courts still adhere in ingestion cases to the “impact rule” embodied in the *Schmidt* reasoning,¹²⁹ that reasoning is conceptually flawed. Judge Fuchsberg, in his dissent to *Steinhardt v. Johns-Manville Corp.*,¹³⁰ in which the *Schmidt* rule was upheld in 1981, ably pointed out the problem:

[W]hile the unwanted invasion of their lungs by environmental air which had been contaminated by asbestos dust are the wrongful acts to which they are subjected, the damages they sustained were in the form of diseases which did not come about until much later.

....

The plaintiffs go on to assert that the properties of particles of asbestos are such that their inhalation will not necessarily result in the contraction of the disease; . . . that those who are exposed may never sustain any injury at all. . . .¹³¹

The *Schmidt* holding asserts that plaintiffs can obtain a remedy upon exposure to a deleterious substance whether or not they ultimately become diseased from the exposure. The *Shideler* court made the analogy that Dwyer could have proven damages upon death of the testator even if the will were later upheld by the probate court; she was entitled to a remedy “when Moore died leaving a testamentary provision in favor of the plaintiff of questionable validity.”¹³²

¹²⁶*Id.* at 289.

¹²⁷The court refers not only to “damage” but also to “the extent of the damage.” The implication is that the occurrence of any damage, no matter how slight, will be sufficient to begin the limitation period. *Id.*

¹²⁸417 N.E.2d at 289-90 (quoting 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936)).

¹²⁹See *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 467 N.E.2d 517 (1984).

¹³⁰54 N.Y.2d 1008, 430 N.E.2d 1297 (1981).

¹³¹*Id.* at 1012-13, 430 N.E.2d at 1300 (Fuchsberg, J., dissenting).

¹³²417 N.E.2d at 291.

If *Schmidt* is even theoretically correct, then any entity which releases virtually any substance into the environment is at once suable, because anything is capable of causing harm to someone under some circumstance. As the *Shideler* court pointed out, however, "the ultimate effect upon the plaintiff of the defendant's alleged negligence was *speculative* at the time the cause of action accrued, but it cannot be questioned that the *impact* occurred at the time of Moore's death."¹³³ Even so, if the effect of the negligence is "speculative," then the negligence is not actionable. "Impact" without actual, provable damages is clearly insufficient under negligence law to create a cause of action.

Although the *Shideler* court appeared to adopt the *Schmidt* impact rule, the court recognized that

[t]here is authority supporting the proposition that statutes of limitation attach when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. . . . There may be special merit to that viewpoint where . . . the plaintiff was the client or the patient. . . .¹³⁴

The court noted that the discovery rule has been applied where "the misconduct was of a continuing nature or concealed."¹³⁵ These observations might appear to limit the Indiana application of the "impact rule" to facts like those in *Shideler* in which the alleged misconduct was open and was a single rather than a protracted occurrence. Yet the court's substantial reliance on *Schmidt*, a protracted exposure case, and its express rejection of the "ascertainable damages" rule clearly suggest that a far wider scope to the "impact rule" was being mandated than simply legal malpractice. That the signals emanating from the *Shideler* opinion were mixed and confusing can be illustrated by a review of the cases in the four-year period after *Shideler* and before *Barnes*.

V. *Shideler's* PRODUCT LIABILITY PROGENY

Several product liability cases involving statutes of limitations based on accrual dates were decided subsequent to *Shideler*. In *Wojcik v. Almase*,¹³⁶ doctors had inserted a catheter in the chest of the plaintiff. While in place, part of the catheter broke off and remained lodged in the chest. This fact went undetected for a year. Within two years of discovery of the catheter fragment *in situ*, the plaintiff brought suit

¹³³*Id.* (emphasis added).

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶451 N.E.2d 336 (Ind. Ct. App. 1983).

against the doctors for malpractice and against the catheter manufacturer for damages resulting from its having manufactured a defective product.

The malpractice statute of limitations governing the claim against the doctors was held to be an "occurrence statute, not a discovery statute."¹³⁷ It ran from the date "of the alleged act, omission or neglect."¹³⁸ Therefore, the plaintiff's malpractice claim was time-barred.

The product liability claim against the manufacturer was governed by the Indiana Product Liability Act section which requires that a product liability action must be commenced within two years after the cause of action accrues.¹³⁹ The court ruled that product liability claims accrue when the plaintiff is harmed, not when the harm is discovered.¹⁴⁰ The court made no reference to *Shideler* nor to the line of cases requiring that damages be susceptible of ascertainment.

In *Monsanto Co. v. Miller*,¹⁴¹ the plaintiff dairy farmers sought recovery for the loss of a silo. The silo had become unusable because it was coated with a product manufactured by the defendants which contained PCB's. It was necessary in the case to establish when the plaintiff's cause of action accrued in order to determine which statute of limitations would govern the claim: the one dealing with injuries to real estate¹⁴² or the one governing product liability claims.¹⁴³ Both statutes were accrual statutes so that the legal principles to be applied were the same although the relevant facts as found by the factfinder would dictate the choice of limitation periods.

The court cited many of the authorities already discussed in this Article, concluding that Indiana does not have a discovery rule,¹⁴⁴ but that for a cause to accrue there must be some "ascertainable" damages.¹⁴⁵ Even *Shideler* was cited (incorrectly) for that proposition.¹⁴⁶ The court ruled that the farmer's cause of action accrued only when the PCB level in the herd's milk reached a statutorily impermissible level.¹⁴⁷ A *Schmidt/Shideler* analysis, however, would appear to dictate that a cause of action would accrue as soon as the silage the cows ate exposed them to PCB's,

¹³⁷*Id.* at 338.

¹³⁸*Id.* (quoting IND. CODE § 16-9.5-3-1 (1982)).

¹³⁹*Id.* at 341 (quoting IND. CODE § 33-1-1.5-5 (1982)).

¹⁴⁰*Id.* at 342.

¹⁴¹455 N.E.2d 392 (Ind. Ct. App. 1983).

¹⁴²IND. CODE § 34-1-2-1 (1982).

¹⁴³IND. CODE § 33-1-1.5-5 (1982).

¹⁴⁴See cases cited at 455 N.E.2d at 394.

¹⁴⁵*Id.*

¹⁴⁶455 N.E.2d at 394. See *supra* text accompanying note 126. The *Shideler* court never acknowledged that "ascertainable" damages were necessary for accrual. That court's reliance on the New York "impact rule" cases leads to the conclusion that some slight damage, even if totally undiscoverable, would be sufficient to start the statute of limitations running.

¹⁴⁷*Id.* at 396.

because, at that time, the PCB level (like the will provision drafted in *Shideler*) was such that it would ultimately be ruled illegal.¹⁴⁸

In *Tolen v. A.H. Robins Co.*,¹⁴⁹ the district court was confronted with facts similar to those in the *Barnes* case. A Dalkon Shield was inserted in the plaintiff's uterus in February, 1972; she became pregnant in July, 1972, and learned in November, 1972, that an operation would be required to locate the shield. The shield was found in May, 1975, in her lower left stomach cavity. The plaintiff alleged that she discovered the causal connection between the shield and the various health problems she had suffered by reading a newspaper article on December 20, 1979. She brought suit on November 13, 1981.

In granting Robins' motion for summary judgment,¹⁵⁰ the district court held that Tolen's action was barred by the Indiana two-year statute of limitations.¹⁵¹ The court stated that "[i]t is the well-established rule in Indiana that a cause of action accrues at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment."¹⁵² The court then stated that the "Supreme Court of Indiana has recently reaffirmed this rule of law in *Shideler v. Dwyer*."¹⁵³ As has been emphasized, however, *Shideler* appears to reject the requirement that damages be ascertainable.¹⁵⁴ In any event, no Indiana case until *Barnes* specifically required actual or constructive knowledge of a causal nexus between injury and the defendant's product to start the statute of limitations running.¹⁵⁵

Rejecting the *Barnes*-type discovery rule urged by the plaintiff,¹⁵⁶ which would have begun the limitation period in 1981, the *Tolen* court

¹⁴⁸Looking back through the facts, it is clear that the "impact" on the plaintiff occurred no later than the time his cows first ingested feed containing PCB's. The PCB level in the silage presumably did not change over time; only the governmental regulation of what constituted a permissible level changed. Therefore, the harm (under *Shideler*) occurred when the cows were first exposed to PCB's, but the manifestation of the harm occurred when the PCB level was ruled illegal for sale. One could even argue that the impact on the plaintiff's real property, based on hindsight analysis, occurred when the silo was first coated with cumar. The court specifically rejected that date on the ground that "no damages could [then] have been ascertained." *Id.* at 395. Under *Shideler*, however, the lack of ascertainable damages would have been no obstacle to the running of the statute of limitations.

¹⁴⁹570 F. Supp. 1146 (N.D. Ind. 1983).

¹⁵⁰*Id.* at 1148.

¹⁵¹IND. CODE § 34-1-2-2 (1982).

¹⁵²570 F. Supp. at 1149.

¹⁵³*Id.* (citing 417 N.E.2d 281 (Ind. 1981)).

¹⁵⁴See *supra* notes 126-33 and accompanying text.

¹⁵⁵The court rejected the plaintiff's argument that *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878 (S.D. Ind. 1970), stands for a *Barnes*-type discovery rule. 570 F. Supp. at 1150. The court's analysis is probably correct. See *supra* notes 85-91 and accompanying text. There is, however, language in an earlier case that does foreshadow the *Barnes* rule. See *supra* notes 77-82 and accompanying text.

¹⁵⁶570 F. Supp. 1150-51.

considered several other key dates. The court observed that legal injury first occurred when the shield was inserted; beginning the statutory period on that date would comport with the *Shideler* rule.¹⁵⁷ Actual knowledge of the device's *ineffectiveness* occurred in July of 1972, which constituted knowledge of legal damage, at least with respect to Tolen's wrongful pregnancy claim.¹⁵⁸ With respect to her other damages involving health impairment, the plaintiff had knowledge of injury in November, 1972, and May, 1975. The court ruled that there was sufficient evidence of damages susceptible of ascertainment no later than May of 1975, and, therefore, her claim filed in 1981 must be barred.¹⁵⁹ The *Tolen* court's accrual analysis illustrates the liberality of the *Barnes* rule under which a plaintiff like Tolen might recover.¹⁶⁰

That the *Shideler* holding provided uncertain guidance for governing the accrual of delayed manifestation disease cases was amply demonstrated in *Braswell v. Flinkote Mines, Ltd.*¹⁶¹ The plaintiffs in *Braswell* were asbestos workers who discovered that they had asbestos-related diseases after more than two years had passed following their last exposure to asbestos dust. The court of appeals felt bound to follow *Shideler* as controlling precedent and affirmed the district court's grant of the defendants' motion for summary judgment.¹⁶² The appellate court read *Shideler* to require the setting of accrual dates in ingestion cases no later than the date of the plaintiffs' most recent exposure to the deleterious substance.¹⁶³ The court stated that, in light of *Shideler*, the plaintiffs would have been permitted to maintain their actions for damages prior to the manifestations of any symptoms of disease. Although the federal court conceded that neither the *Shideler* court nor any other Indiana court had explicitly adopted the "'wrongful act' or 'impact' rule of accrual," the reliance in *Shideler* on New York cases based upon the impact rule seemed to indicate that such would be the result if the last exposure problem were ever presented directly to the Indiana Supreme Court.¹⁶⁴

Judge Swygert, in a strong dissent, vehemently disagreed.¹⁶⁵ He predicted that the Indiana Supreme Court would recognize that the

¹⁵⁷*Id.* at 1150.

¹⁵⁸*Id.*

¹⁵⁹*Id.* at 1151.

¹⁶⁰For a discussion of other issues raised in the *Tolen* case, see Leibman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 320-22 (1985).

¹⁶¹723 F.2d 527 (7th Cir. 1983).

¹⁶²*Id.* at 531-33.

¹⁶³*Id.* at 532.

¹⁶⁴*Id.*

¹⁶⁵*Id.* at 533 (Swygert, J., dissenting).

impact rule produces a "mockery of justice,"¹⁶⁶ and he urged that the accrual question be certified to the Indiana high tribunal:

To state the obvious, if an asbestosis claimant brought an action against manufacturers of asbestos before any manifestation of the disease, the claimant would be " 'laughed out of court' ". . . . On the other hand, if the claimant waits for the disease to manifest itself, the claimant, under the court's holding today, may be barred from bringing a claim by Indiana's statute of limitations.¹⁶⁷

The dissent found three reasons to distinguish *Shideler* from *Braswell*. First, in *Shideler*, the "negligence was capable of discovery any time after the contents of the will were disclosed;" in *Braswell*, the injury was "not even capable of discovery in many instances on the date of last exposure."¹⁶⁸ Second, the relationship of a will-drafting lawyer to a beneficiary calls for different policies than those between a product manufacturer and user. Manufacturers are in most instances better able to bear the costs related to defective products than are professionals and "are more likely to anticipate long-delayed injuries."¹⁶⁹ Third, Indiana has enacted a ten-year repose provision for product liability claims that is not available in professional malpractice cases. Product manufacturers, therefore, do not require the same measure of protection from a strict accrual rule that professionals do.¹⁷⁰ For these reasons, the Indiana Supreme Court might be persuaded to adopt a discovery rule in the delayed manifestation cases that only recently have become recognized as a serious consequence of modern industrial development. "The Indiana Supreme Court should be given an opportunity to follow the equitable lead of other state courts and to construe its state statutes to meet the changing needs of a modern, technologically advanced society."¹⁷¹

In addition, the dissent argued that the majority had been misled by dicta in *Shideler*. While citing and quoting cases calling for accrual on the date of the defendant's wrongful act, the actual holding in *Shideler* stated that there must be an injury to the plaintiff for the statute of limitations to commence running. Thus, in *Shideler*, the negligent drafting of the will provision was the defendant's wrongful act, but the court found that no injury or impact occurred until the will became operative following the testator's death. According to the *Braswell*

¹⁶⁶*Id.*

¹⁶⁷*Id.* (quoting, in part, from *Martinez-Ferrer v. Richardson-Merrell Inc.*, 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980)).

¹⁶⁸*Id.* at 534.

¹⁶⁹*Id.*

¹⁷⁰*Id.* at 534-35.

¹⁷¹*Id.* at 535.

dissent, an accurate analogy of the *Shideler* rule applied to asbestos cases would have the statute of limitations begin with the onset of asbestos-related disease, rather than with the mere exposure to the asbestos dust.¹⁷²

After a careful reading of *Shideler*, this writer believes that the *Braswell* majority interpreted the *Shideler* dicta correctly.¹⁷³ *Shideler* equates exposure with impact and impact with injury (or "damage"); such injury, impact, or damage is sufficient for accrual.¹⁷⁴ The dissent is correct, however, that such reasoning is a mockery of justice — not only in disease cases — but also in legal malpractice cases and tort actions generally. Until damages are *reasonably* ascertainable there is really no cause of action. This is certainly what the ordinary person would contemplate to be a basic tenet of fundamental fairness.¹⁷⁵

When the Indiana Supreme Court first introduced the requirement of ascertainable damages in *Montgomery v. Crum*,¹⁷⁶ it cited the case of *Jones v. Texas & P. Ry.*¹⁷⁷ In *Jones*, the plaintiff brought suit against the defendant railroad for the value of two mules allegedly run over and killed by a locomotive. One mule died immediately; the other lived for a while. The serious nature of his injuries was not apparent until he died. The Louisiana statute of limitations ran one year " 'from the day the injuries were sustained.' " ¹⁷⁸ The plaintiff brought suit more than one year after the accident, but less than one year after the second mule died. The court held that the suit to recover for the second mule was timely because not until his death were damages susceptible of ascertainment. "Until then, it was at best uncertain, contingent, speculative; and nothing is better settled in the law of damages than that a damage of that character does not give rise to a cause of action."¹⁷⁹

¹⁷²*Id.* at 534.

¹⁷³It is true that the *Shideler* holding specifically covers only legal malpractice. However, despite recognition that a discovery rule might have merit in other situations, 417 N.E.2d at 291, the court did not caution that its reasoning was to be limited to the legal malpractice area. Indeed, the analogies chosen by the court and the general thrust of its discussion of statutes of limitations, while dicta, strongly suggest that the principles espoused were to have general applicability.

¹⁷⁴The *Shideler* court distinguishes the term "damage" from the term "damages." 417 N.E.2d at 289. The court states that damage is "a requisite element of any tort," and damages is "a measure of compensation." Under the theory of negligence (and presumably strict liability as well), "[a]ctual loss or damage . . . is an essential part of a plaintiff's case." PROSSER, LAW OF TORTS 143 (4th ed. 1971). "Actual damage," however, is compensable and measurable. Where there is "actual damage," therefore, there are "damages," even if they are difficult to calculate.

¹⁷⁵See *supra* notes 126-33 and accompanying text.

¹⁷⁶199 Ind. 660, 161 N.E. 251 (1928).

¹⁷⁷*Id.* at 679, 161 N.E. at 259 (citing 125 La. 542, 51 So. 582 (1910)).

¹⁷⁸125 La. at 542, 51 So. at 582.

¹⁷⁹*Id.* at 543, 51 So. at 583.

The *Jones* court made clear that “[i]n law, things which are not susceptible of ascertainment are considered as not existing.”¹⁸⁰ In *Jones*, the defendant performed a single, unconcealed act. The *possibility* of internal injuries that *might* lead to serious complications was almost certainly an event within the contemplation of the plaintiff at the time of the collision, yet the court did not charge him with damages susceptible of ascertainment until the possibility was confirmed as a reality. It should not be necessary to distinguish *Shideler* as a case in which an astute beneficiary might have foreseen the coming injury by predicting how a probate court would construe a will provision. That clairvoyance was no more possible than *Jones*’ ability to predict his mule would suffer a relapse. In neither case were damages reasonably susceptible of ascertainment. In addition, neither plaintiff should have been barred by the statute of limitations.

That tort defendants are entitled to differing accrual dates based on their relationship to the plaintiff is also a dubious proposition. The liability of manufacturers to users for defective products may be held to be independent of proof of negligence, yet such an adoption of strict liability theory has no connection with the time at which a cause of action accrues. The timing requirement for any tort action would appear to call for a single rule based upon either a policy of realistic reasonableness or a policy of strict construction. There is no principled way to apply a “reasonable ascertainment” rule in delayed manifestation product liability cases, and a strict “impact” or “slight injury” rule in other tort cases. Moreover, it is questionable whether product manufacturers are in fact better positioned to bear the costs of defective products than professionals are to bear the cost of defective services.¹⁸¹ In both instances the costs are allocable to the respective enterprises, and those costs will be spread to users in the form of higher prices. If there is consensus that not all of these costs should be externalized, then there are legislative devices to prevent externalization. Awards can be legislatively capped¹⁸² and “occurrence-based,” rather than “accrual-based,” statutes of limitations can be drafted.¹⁸³

¹⁸⁰*Id.*

¹⁸¹The question is not whether the small practioner can “afford” malpractice insurance. Rather, it is whether the small fellow has to pay substantially more than the big fellow. If the malpractice insurance is priced roughly the same for all practioners (given some adjustment for economies of scale), the question becomes whether the public that purchases the professional services is prepared to externalize and redistribute the full cost of malpractice by paying generally higher fees, or whether the public would rather leave at least some of the cost to rest with the injured client, patient, or customer.

¹⁸²*See, e.g.,* IND. CODE § 16-9.5-2-2(a) (1982) (“The total amount recoverable for any injury or death of a patient may not exceed five hundred thousand dollars (\$500,000).”).

¹⁸³*See, e.g.,* IND. CODE § 34-4-19-1 (1982) (claim for medical malpractice must be filed “within two (2) years from the date of the act . . .”).

That professionals are less prepared than manufacturers to anticipate long delayed effects may be true, but that proposition is, for the most part, somewhat irrelevant to the *Shideler* facts. When *Shideler* drafted Moore's will, she became exposed to eventual malpractice liability at least for such time until Moore died, plus two years thereafter. In most instances, the time period from the wrongful act (the drafting of the will) to the point in time two years after the testator's death will only be marginally shorter than if that period were extended to include the time necessary for the beneficiary to discover the lawyer's negligence. A discovery rule, in will-drafting cases at least, would not appreciably increase the professional's temporal exposure to liability.

What then of the legitimate repose interests of tort defendants? The *Braswell* dissent observed that these are now protected in Indiana product liability cases by a ten-year outer-cutoff of liability (following initial delivery of the product to a user).¹⁸⁴ There is, therefore, no reason to tighten up and distort the meaning of cause of action accrual in order to provide equity to product liability defendants. It is questionable, however, whether the absence of such repose legislation justifies the judicial retention of an impact rule of accrual simply for those classes of tort defendants not protected by a repose statute. If repose protection is called for, the Indiana General Assembly is better positioned than the courts to provide that relief. It is reasonable, therefore, that the limited discovery rule adopted in *Barnes* should soon be extended to tort claims generally and, ultimately perhaps, to all statutes of limitations that are based on accrual.

VI. COLLATERAL ATTACKS ON THE STATUTE OF LIMITATIONS DEFENSE

In addition to the argument that statutes of limitations should not begin running until the plaintiffs discover their injuries (or suffer damages susceptible of ascertainment), plaintiffs have advanced a number of other grounds for postponing, or disqualifying entirely, the date their causes of action accrue. One such ground discussed earlier that has met with acceptance in Indiana is that the defendant's wrongful acts must be completed for the plaintiff's cause of action to accrue and for the limitations statute to begin to run.¹⁸⁵ There are three other arguments that have surfaced frequently in the Indiana cases that bear brief mention because they relate to the concept of a discovery rule.

A. Arguing for a Longer Running Limitations Alternative

Plaintiffs faced with a short-running or early-starting statute of limitations which threatens to bar their claims may plead additional or

¹⁸⁴723 F.2d at 535 (discussing IND. CODE § 33-1-1.5-5 (1982)).

¹⁸⁵See *supra* notes 73-76 and accompanying text (discussing *Montgomery v. Crum*, 199 Ind. 660, 161 N.E. 251 (1928)).

alternative legal theories which are governed by more favorable limitation periods. For example, Indiana plaintiffs barred by the relatively short two-year tort statute of limitations¹⁸⁶ might plead that their cases sound in contract rather than tort,¹⁸⁷ or that their facts should be read as raising both contract and tort claims.¹⁸⁸ Similarly, a plaintiff might argue that the cause of action is based upon injury to real property¹⁸⁹ or is an action for relief against fraud,¹⁹⁰ as opposed to basing his argument upon a theory of product liability. The plaintiff may also take the position that an accrual-based personal injury statute should be applied rather than an occurrence-based malpractice statute¹⁹¹ or an Occupational Diseases Act limitation provision.¹⁹² Finally, plaintiffs might argue that none of the specific statutes of limitations properly applies to their actions; therefore, their claims should be governed by Indiana's fifteen-year catch-all provision.¹⁹³

¹⁸⁶IND. CODE § 34-1-2-2 (1982) ("For injuries to person or character, for injuries to personal property").

¹⁸⁷See, e.g., *Scott v. Union Tank Car Co.*, 402 N.E.2d 992, 993 (Ind. Ct. App. 1980) (holding that plaintiff's claim for retaliatory discharge following plaintiff-employee's filing of a workers' compensation claim sounds in tort); *French v. Hickman Moving and Storage*, 400 N.E.2d 1384, 1388 (Ind. Ct. App. 1980) (holding that claim was for conversion, not breach of a contract of bailment); *Cordial v. Grim*, 169 Ind. App. 58, 61-62, 346 N.E.2d 266, 269 (1976) (holding that plaintiff's claim was for malpractice rather than breach of an implied contract of employment).

¹⁸⁸See, e.g., *Tolen v. A.H. Robins Inc.*, 570 F. Supp. 1146 (N.D. Ind. 1983) (plaintiff brings, in addition to claims for negligence, strict liability, and fraud, claims under implied and express warranty governed by four-year-from-tender-of-delivery Uniform Commercial Code limitation statute found at IND. CODE § 26-1-2-725 (1982)).

¹⁸⁹See, e.g., *Monsanto Co. v. Miller*, 455 N.E.2d 392 (Ind. Ct. App. 1983) (plaintiff's claim for property damage caused by silo coating containing PCB's held to be governed by either the two-year product liability limitation statute, IND. CODE § 33-1-1.5-5 (1982), or six-year statute for injury to property other than personal property, IND. CODE § 34-1-2-1 (1982), depending upon a finding of whether the cause of action accrued before or after the effective date of the Product Liability Act (June 1, 1978)).

¹⁹⁰See, e.g., *Tolen v. A.H. Robins*, 570 F. Supp. at 1155-66.

¹⁹¹See, e.g., *Cordial v. Grim*, 169 Ind. App. 58, 346 N.E.2d 266 (1976) (applying professional malpractice statute, IND. CODE § 34-4-19-1 (1982), which runs two years "from the date of the act . . . complained of," rather than IND. CODE § 34-1-2-2 (1982) which runs two years "after the cause of action has accrued").

¹⁹²See, e.g., *Bunker v. National Gypsum Co.*, 406 N.E.2d 1239 (Ind. Ct. App. 1980) (statute of limitations in Indiana Occupational Diseases Act, IND. CODE § 22-3-7-9(f) (1982), based on claimants' last exposure to asbestos dust, held applicable to claim rather than tort personal injury statute).

¹⁹³See, e.g., *Shideler v. Dwyer*, 417 N.E.2d 281, 287-88 (Ind. 1981) (discussing the possible application to the case of IND. CODE § 34-1-2-3 (1976) ("All actions not limited by any other statute shall be brought within fifteen (15) years.")); *Scates v. State*, 190 Ind. App. 624, 383 N.E.2d 491 (1978) (noting that the 15-year catchall, IND. CODE § 34-1-2-3 (1976), has been held to apply to all eminent domain proceedings despite that, "on its face, IC 1971, 34-1-2-1 reflects the pertinent time period").

Faced with these conflicting legal theories, courts can take one of four approaches. To advance plaintiffs' interests, the court can adopt in each case the longest running statute reasonably applicable to the claim. Alternatively, to accommodate the repose interests of defendants, a court can consistently opt for the shortest applicable statute. Under a third approach, the court may choose to follow the form of the pleadings. If the plaintiff brought the claim *ex contractu*, the appropriate contract statute of limitations would be applied. The fourth approach, which dominates the recent Indiana decisions, permits a court to select the statute of limitations based upon the substance of the complaint.¹⁹⁴ Thus, even if the defendant has breached a contract made with the plaintiff, a court will apply a tort statute of limitations if the injury suffered was the result of a breach of duty imposed by law. For example, in *Cordial v. Grim*,¹⁹⁵ the plaintiff who alleged a breach of contract by his lawyer was held, for statute of limitations purposes, to have brought a tort claim sounding in negligence (malpractice).¹⁹⁶

The issue is compounded by the problem of changing laws. Generally, the statute of limitations in force when the cause of action accrues is applicable to the claim. Determining the accrual date may determine the applicable statute, which, in turn, may either bar the claim or permit it to go forward. In *Monsanto Co. v. Miller*,¹⁹⁷ the plaintiff alleged that his property had been injured by a defective silo coating manufactured by the defendant. If the cause of action was found to have accrued after June 1, 1978, the two-year accrual statute of limitations (and the ten-year repose provision) of the Indiana Product Liability Act¹⁹⁸ would apply. If accrual was established prior to that date, "the six-year statute of limitations governing injuries to real property would apply."¹⁹⁹ Only in the latter instance, however, could the plaintiff possibly have a currently viable tort claim. The case was remanded for further fact-finding to establish the moment of accrual.

There is an artificial rigidity to the Indiana approach that operates to cut off what otherwise might be meritorious claims. Frequently, the issue whether a claim is substantively contractual or tortious in nature is a close question. It seems unreasonable to rest the applicable statute of limitations choice on what is generally an unrelated issue.²⁰⁰ This

¹⁹⁴See, e.g., *Tolen v. A.H. Robins Co.*, 570 F. Supp. at 1155; *Monsanto v. Miller*, 455 N.E.2d at 394; *French v. Hickman Moving and Storage*, 400 N.E.2d at 1390-91; *Cordial v. Grim*, 169 Ind. App. at 63, 346 N.E.2d at 269. But see *Amermac, Inc. v. Gordon*, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979).

¹⁹⁵169 Ind. App. 58, 346 N.E.2d 266 (1976).

¹⁹⁶*Id.* at 61-68, 346 N.E.2d at 268-72.

¹⁹⁷455 N.E.2d 392 (Ind. Ct. App. 1983).

¹⁹⁸IND. CODE § 33-1-1.5-5 (1982).

¹⁹⁹455 N.E.2d at 394.

²⁰⁰Presumably there should be some relationship between the equities presented by a

problem was highlighted in *Scott v. Union Tank Car Co.*,²⁰¹ in which Judge Staton dissented to the majority's characterization of the plaintiff's retaliatory discharge claim as sounding in tort.²⁰² While arguing that retaliatory discharge was substantively contractual, the dissent pointed out that the policy followed in other jurisdictions "with apparent unanimity" is "that when a question arises with respect to which of two applicable statutes of limitations should govern a particular cause of action, the doubt should be resolved in favor of the theory containing the longer period of limitations."²⁰³

The rationale for the policy articulated by Judge Staton is that accrual-based statutes of limitations should not be viewed as primary dispute-settling mechanisms or as means to effectuate economic policy. They exist as incentives for plaintiffs to bring their claims promptly and as devices to protect defendants from having to defend presumptively nonmeritorious claims. When they operate to deny legitimate plaintiffs their day in court, their application should be rethought.

B. *Fraudulent Concealment*

Plaintiffs who learn of their injuries too late to bring their claims within the relevant limitation period frequently seek to have the statutes tolled on the ground that the defendants wrongly withheld information from them, which, if it had been communicated, would have enabled them to file their claims timely. The issue, then, is whether the defendants had a duty to disclose the relevant information to the plaintiffs.²⁰⁴

particular fact situation and the length and starting time of the controlling limitations period. The fact that a written contract in Indiana is governed by a ten-year statute and an oral one by a six-year statute is supposedly related to the presumed freshness of the evidence generally available in the two classes of cases. Similarly, a two-year tort personal injury statute represents an appropriate average balancing point for plaintiff and defendant interests in this type of case. But if a given set of facts could reasonably be characterized as either a tort claim or a contract claim, it seems unreasonable that the final categorization of the action, as either tort or contract, should be permitted to extend or diminish the limitation period by several years. Where there is a choice of limitation periods, it would seem more equitable to make the choice on the basis of policies that shape limitation legislation: policies of repose consistent with providing plaintiffs broad access to the legal process. Choosing the limitation period by following such a policy-based approach must be recognized, however, as a fact sensitive exercise. See *infra* notes 201-03 and accompanying text.

²⁰¹402 N.E.2d 992 (Ind. Ct. App. 1980).

²⁰²*Id.* at 993 (Staton, J., dissenting).

²⁰³*Id.* at 997. See also Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 463-66, for a discussion of the *Scott* case.

²⁰⁴See, e.g., *Miller v. A.H. Robins Co.*, 766 F.2d 1102, 1106-07 (7th Cir. 1985); *Pitts v. Unarco Indus.*, 712 F.2d 276, 278-79 (7th Cir. 1983); *Tolen v. A.H. Robins Co.*, 570 F. Supp. 1146, 1151-52 (N.D. Ind. 1983); *Withers v. Sterling Drugs Inc.*, 319 F. Supp.

When there is a confidential or fiduciary relationship between plaintiff and defendant the duty of full disclosure certainly exists.²⁰⁵ But when the relationship is that of product manufacturer and user, or bailor and bailee, or the like, Indiana requires some affirmative act amounting to more than passive silence in order to remove the case from the operation of the statute of limitations.²⁰⁶ Even when there is a confidential relationship between the parties, the termination of that relationship ends the duty to disclose, and the statute of limitations may commence to run from the time of termination.²⁰⁷ "In addition, Indiana law requires a showing of reasonable care and due diligence on the part of the plaintiff. . . . He must have been ignorant of the fraud and have been unable to have discovered it by reasonable diligence."²⁰⁸

In the product liability context, the passive concealment rule probably operates too strictly in Indiana. In cases where product sellers would be held liable to users under a failure-to-warn theory,²⁰⁹ they should not be able to take advantage of the users' ignorance of product dangers that ought to have been disclosed to them. A rule holding that a failure to warn tolls the statute of limitations would provide a powerful incentive

878, 881 (S.D. Ind. 1970) (citing IND. CODE ANN. § 2-609 (Burns Repl. 1967), which called for tolling the statute until "after the discovery of the cause of action" when the person liable conceals the facts "from the knowledge of the person entitled thereto"); *Guy v. Schuldt*, 236 Ind. 101, 106-12, 138 N.E.2d 891, 894-97 (1956); *Wojcik v. Almase*, 451 N.E.2d 336, 338-41 (Ind. Ct. App. 1983); *French v. Hickman Moving & Storage*, 400 N.E.2d 1384, 1389 (Ind. Ct. App. 1980); *Cordial v. Grim*, 169 Ind. App. 58, 68-70, 346 N.E.2d 266, 272-73 (1976).

²⁰⁵*Guy v. Schuldt*, 236 Ind. at 109, 138 N.E.2d at 895; *French v. Hickman Moving & Storage*, 400 N.E.2d at 1389.

²⁰⁶*See, e.g., Miller*, 766 F.2d at 1106-07 (manufacturer); *Pitts*, 712 F.2d at 279 (manufacturer); *Tolen*, 570 F. Supp. at 1151 (manufacturer); *French*, 400 N.E.2d at 1389 (bailor). *See also* *Philpott v. A.H. Robins Co.*, 710 F.2d 1422, 1425-26 (9th Cir. 1983) (reaching the same conclusion under Oregon law).

²⁰⁷*See, e.g., Cordial*, 169 Ind. App. at 69, 346 N.E.2d at 272; *Toth*, 164 Ind. App. at 623, 330 N.E.2d at 339 (citing *Guy v. Schuldt*, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956)).

²⁰⁸*Tolen*, 570 F. Supp. at 1152. *See also Miller*, 766 F. Supp. at 1106-07. Other jurisdictions have taken a more liberal position on this issue. *See Allen v. A.H. Robins Co.*, 752 F.2d 1365, 1370-76 (9th Cir. 1985) (Idaho law).

²⁰⁹Under strict liability, generally three classes of defects are recognized: production or manufacturing defects; design defects; and defective condition as a result of the seller's failure to provide adequate warnings and directions. *See NOEL & PHILLIPS, PRODUCTS LIABILITY* 359-524 (1976). Failure to warn of unreasonably dangerous defects is recognized as a ground for imposing liability. *RESTATEMENT (SECOND) OF TORTS* § 402A, comments h, j, & i (1965). Section 402A was adopted by the Indiana Supreme Court in *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335 (1973). The failure to warn has been expressly recognized as a basis for imposing liability in a number of Indiana cases. *See, e.g., Nissen Trampoline Co. v. Terre Haute First Bank*, 332 N.E.2d 820 (1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1974); *Dudley Sports Co., Inc. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

for product sellers to increase the dissemination of safety information.²¹⁰ Although injured users should have to allege that they relied to their detriment on the inadequate information provided by the sellers, the sellers should be assigned the task of rebutting the allegations of reliance in order to invoke a limitations shield.²¹¹ This tolling rule should apply to repose provisions as well as ordinary statutes of limitations.²¹² On the other hand, no duty to warn should attach prior to the defendant's

²¹⁰It is generally acknowledged that market forces operate more efficiently in a regime in which buyers and sellers can make free and fully informed choices, as opposed to one that is highly regulated.

²¹¹In Indiana, statutes of limitations are an affirmative defense. IND. R. TR. P. 8(C). The suggestion in the text would preclude granting a defendant's summary judgment motion on statute of limitation grounds if the plaintiff has alleged a failure to warn on the defendant's part and has also alleged detrimental reliance on the inadequate information provided by the defendant-seller. Normally a plaintiff's reliance is not an element of a strict tort case, although reliance does play a major role in establishing causation where failure to warn is the theory of recovery: "As a part of the plaintiff's prima facie case, the plaintiff bears the burden of demonstrating that the absence of warnings was a producing cause of the accident." *Horak v. Pullman, Inc.*, PROD. LIAB. REP. (CCH) ¶ 10,585 (5th Cir. July 5, 1985) (Texas law); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 605 (Tex. 1972) (applying Oklahoma law). Nonetheless, justifiable reliance is an essential element that must be proved in a fraud case. For a failure to warn allegation to trigger the fraudulent concealment doctrine, it seems reasonable that the elements of reliance and due diligence should be coupled with the allegation of inadequate warning.

²¹²Where a discovery rule applies to accrual-based statutes of limitations, the fraudulent concealment doctrine has little bite because, absent discovery, the statute does not begin to run, whether or not the discovery was delayed by concealment. However, if a jurisdiction takes the position that mere failure to discover an injury provides no basis for tolling the state's product liability repose statute — as appears to be the case in Indiana, *Pitts v. Unarco Indus.*, 712 F.2d 276 (7th Cir. 1983); *cf. Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982) (lack of the claimant's discovery of his asbestosis held to be insufficient to toll three-year-from-last-exposure-occurrence-based Occupational Diseases Act statute of limitations) — the suggested extension of the fraudulent concealment doctrine to failure-to-warn cases should provide a compromise between a total "discovery" regime and one in which only the affirmative act of withholding information would suspend operation of statutes of limitations and repose.

See also *MacMillen v. A.H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984) (holding that summary judgment was inappropriate for invoking Nebraska's ten-year repose statute after the plaintiff's petition alleged that the defendant had intentionally withheld information regarding dangers inherent in the use of the Dalkon Shield). The *MacMillen* court held that if the plaintiff could prove due diligence in pursuing the cause of her injury, the defendant would be equitably estopped from raising the repose statute as a defense. The court followed *Knaysi v. A.H. Robins Co.*, 679 F.2d 1366 (11th Cir. 1982), in which similar reasoning was invoked to toll New York's accrual-based statute of limitations. The proposal in the text would permit a similar result even if the withholding of information were unintentional. In other words, a repose statute would continue to be effective, but only in cases where warnings are found to be adequate, or where the plaintiff failed to exercise due diligence or did not rely on the incomplete or inaccurate information provided by the defendant.

having a feasible opportunity to acquire the relevant knowledge of the danger.²¹³

C. *Constitutionality of Statutes of Limitations and Repose*

Absent discovery rules, statutes of limitations and repose provisions which operate to bar plaintiffs who are unable to discover the existence of their injuries, the nature of those injuries, or their causes are sometimes subjected to attack on equal protection²¹⁴ and due process grounds.²¹⁵ Equal protection arguments are generally based on the proposition that the limitations provision has created classes of potential claimants with varying privileges and immunities that have no rational basis for existing.²¹⁶ Due process arguments are grounded on the theory that claimants who become time-barred because of ignorance resulting from no fault of their own have been effectively and wrongfully denied access to the legal process.²¹⁷

Equal protection attacks on statutes of limitations have made little headway in Indiana. Where no fundamental right or suspect class has been identified,²¹⁸ virtually any classification established by the Indiana legislature is generally found to have a rational basis.²¹⁹ This approach

²¹³See *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (holding that the manufacturer had a duty to warn (or compensate) victims of exposure to asbestos end-products, even though knowledge of the harmful nature of asbestos in end-products may not have been within the state of the art scientifically available to the manufacturer). This author criticizes the *Beshada* rule in Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM. BUS. L.J. 403 (1984). Other articles that discuss the *Beshada* case are listed in Leibman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 330 n.213 (1985). The Indiana Product Liability Act specifically provides for a state-of-the-art defense. IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1985).

²¹⁴See U.S. CONST. amend. XIV, § 1; IND. CONST. art. 23. These two constitutional provisions have been interpreted to require a rational basis for state action. *712 F.2d 276, 280* (7th Cir. 1983); *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979).

²¹⁵See U.S. CONST. amend. V & XIV, § 1; IND. CONST. art. 1, § 12. Article 1, § 12 provides in part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."

²¹⁶See, e.g., *Pitts*, 712 F.2d at 280; *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 25 (N.D. Ind. 1980); *Scalf v. Berkel*, 448 N.E.2d 1201, 1205-06 (Ind. Ct. App. 1983).

²¹⁷See, e.g., *Pitts*, 712 F.2d at 279; *Bunker v. National Gypsum Co.*, 426 N.E.2d 422, 423-25 (Ind. Ct. App. 1980), *rev'd*, 426 N.E.2d 9 (Ind. 1982); *Scalf*, 448 N.E.2d at 1202-05.

²¹⁸See *Scalf*, 448 N.E.2d at 1205 (quoting *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976)).

²¹⁹See *Pitts*, 712 F.2d at 281 (holding that the Indiana repose statute "must be sustained as reflecting the legislative twin goals of (a) repose (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence"); *Dague*, 513 F. Supp. at 25 ("The Supreme Court of Indiana . . . has already clearly recognized that the protection of liability insurance companies is a legitimate legislative concern."); *Bunker*,

is generally a practical one, because most legislation can be found to confer advantages to some and not to others. As long as the legislature does not act corruptly, it should be free to experiment by taking one remedial step at a time.

The due process attacks in Indiana are more compelling. Despite the presumption of constitutionality to which the legislature's acts are entitled,²²⁰ there is Indiana authority requiring the courts to act when limitation periods are found to be too short to provide reasonable relief.²²¹ The Indiana Court of Appeals invoked this authority in *Bunker v. National Gypsum Co.*,²²² holding unconstitutional the three-year-from-date-of-last-exposure statute governing asbestos claims under the Indiana Occupational Diseases Act.²²³ The supreme court accepted transfer of *Bunker* and reversed.²²⁴ The court took the position that determining the length of limitation periods is strictly a legislative task.²²⁵

It seems clear that the supreme court shirked a duty in *Bunker*. Although the court is not a drafter of legislation, it has a responsibility to monitor the constitutionality of legislation challenged on due process grounds. The accumulated evidence indicated that a three-year time period was far too short for substantial numbers of asbestos claimants to detect symptoms of disease. The court should have mandated new legislation adequate to pass minimal constitutional muster. This is not to say that a discovery rule is required by the due process clause, but some change in the three-year-last-exposure rule was appropriate.²²⁶

The strict treatment of limitation statutes might have been viewed by the court as conducive to preserving the viability of Indiana manufacturers and their insurers. However, timing limitations should be used with great care as instruments to effectuate economic policy. As noted in the introduction to this Article, repose provisions perhaps can be justified on the ground that risks are less efficiently shifted from users

441 N.E.2d at 13 (holding that the last exposure rule for asbestos must be sustained because otherwise "the statutory scheme providing for the application of a 'discovery' rule only in radiation exposure cases, would be subverted").

²²⁰*Bunker*, 441 N.E.2d at 11; *Sidle v. Majors*, 264 Ind. 206, 208, 341 N.E.2d 763, 766 (1976).

²²¹*Wright-Bachman, Inc. v. Hoodlet*, 235 Ind. 307, 133 N.E.2d 713 (1956). "[T]he courts will not inquire into the wisdom of the legislative decision in establishing the period of legal bar, unless the time allowed is so short that the statute amounts to a practical denial of the right itself and becomes a denial of justice." *Id.* at 323, 133 N.E.2d at 720.

²²²426 N.E.2d 422, 423 (Ind. Ct. App. 1981).

²²³*Id.* at 425.

²²⁴441 N.E.2d 9 (Ind. 1982).

²²⁵*Id.* at 12.

²²⁶*See Peterson v. Roloff*, 57 Wis. 2d 1, 203 N.W.2d 699 (1973). In *Roloff*, the Wisconsin Supreme Court decided that adoption of a discovery rule was "a matter peculiarly for legislative determination." *Id.* at 5, 203 N.E.2d at 702. The court noted, however,

to sellers as the end of the useful life of products approaches.²²⁷ On the other hand, repose provisions cannot be economically justified merely on the ground that business requires relief from production costs. Subsidizing an enterprise invariably leads to the inefficient allocation of economic resources.²²⁸ Business enterprises, to the greatest extent possible, should be assigned the task of bearing and distributing the full costs of production, which would include the costs of defect-related accidents and health impairments.

Subsequent to *Bunker*, the constitutionality of the ten-year repose provision of the Indiana Product Liability Act was upheld on due process grounds in *Scalf v. Berkel*,²²⁹ *Pitts v. Unarco Industries*,²³⁰ and *Braswell v. Flinkote Mines, Ltd.*²³¹ In *Braswell*, the two-year accrual statute of limitations, held to run from date of last exposure to asbestos, was similarly upheld as not being denial of due process.²³²

VII. SUMMARY AND CONCLUSION

Almost a century ago, the Indiana Supreme Court held that causes of action accrue, and statutes of limitations based on accrual begin to run, only when the plaintiff suffers injury.²³³ Subsequently, the court ruled in two non-tort cases that causes accrue upon the happening of

that "the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short" *Id.* The court strongly recommended that the three-year rule be amended by the legislature (which it did by enacting a discovery rule a few years later). In *Roloff*, the court could have found the existing three-year period from date of undiscoverable injury to be a denial of due process, and it could have done so without adopting a discovery rule. Also, the court simply could have assumed the existence of a discovery rule in the particular fact situation without discussion of the issue, which it did several years later in *Wisconsin Natural Gas v. Ford, Bacon & Davis Const. Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980). Later, the court decided that the time was ripe for a general tort discovery rule, and this time, without deferring to, or even urging the legislature, the court explicitly adopted a sweeping rule of discovery in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

²²⁷See *supra* notes 21-30 and accompanying text.

²²⁸If unhindered market forces lead to maximum economic efficiency, then intervention, e.g., subsidization, will affect and distort the conduct of the economic actors. For example, if the true cost of producing toxic substances and dangerous medical devices is subsidized by shielding the manufacturers from liability, the price of those products will be reduced, demand will be increased, and more of the products will be produced than if the producers were required to absorb and/or pass on the costs as part of the product price. Without subsidization, the efficient market would direct some of the resources expended on subsidized production to other activities.

²²⁹448 N.E.2d 1201.

²³⁰712 F.2d 276.

²³¹723 F.2d 527.

²³²*Id.* at 529-31.

²³³*Board of Commr's of Wabash County v. Pearson*, 120 Ind. 426, 22 N.E. 134 (1889). See *supra* notes 68-72 and accompanying text.

injury, whether or not the plaintiff is aware of the injury.²³⁴ But in 1928, the court in *Montgomery v. Crum*²³⁵ stated that, for an action to accrue, damages must be susceptible of ascertainment. In addition, the court held that the plaintiff's cause will not accrue until the defendant has completed the wrongful act or acts. In support of its ascertainable damages dictum, the court cited a case in which it was made clear that accrual requires damages that are based on discoverable and observable fact, not mere suspicion or possibility of future damages.²³⁶

In the several decades following *Montgomery*, a number of courts either acknowledged the existence of the ascertainable damages rule as a principle of Indiana law or actually rested their holdings on the rule.²³⁷ One court, in upholding the res judicata principle against "action-splitting," held that the ascertainment of even slight damages would be sufficient for a cause of action to accrue.²³⁸ Even so, this case acknowledged that some ascertainable injury sufficient to maintain a lawsuit would be required to start an accrual-based statute of limitations running.²³⁹ Only in one case involving an accrual statute during this period — a personal property conversion case — did the court hold that "[n]otice to the plaintiff was . . . immaterial."²⁴⁰

In 1981, against the weight of Indiana authority, the supreme court, in *Shideler v. Dwyer*,²⁴¹ held that "it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."²⁴² The court cited no Indiana cases in support of this proposition. By embracing the New York "impact" rule in support of its holding, it was clear that the words, "the extent of," in the previous quotation could be omitted from the holding. A tort plaintiff's knowledge of the extent of health impairment, or even the existence in fact of health impairment, would be totally immaterial to the accrual of the action. Under the New York rule, the exposure (or impact) *is the injury*. The fallacy here is that a single exposure to most deleterious substances simply is not actionable. It is not that damages are speculative at this point; they simply do not yet exist. Even a symbolic action calling

²³⁴See *supra* notes 92-96 and accompanying text.

²³⁵199 Ind. 660, 161 N.E. 251 (1928). See *supra* notes 73-76 and accompanying text.

²³⁶*Jones v. Texas and P. Ry.*, 125 La. 542, 51 So. 582 (1910). See *supra* notes 176-80 and accompanying text.

²³⁷See *supra* notes 77-90 and accompanying text.

²³⁸*Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878, 881 (N.D. Ind. 1970).

²³⁹*Id.* at 880-81.

²⁴⁰*French v. Hickman Moving & Storage*, 400 N.E.2d 1384, 1388 (1980). See *supra* notes 97-104 and accompanying text.

²⁴¹417 N.E.2d 281 (Ind. 1981). See *supra* notes 115-35 and accompanying text for the discussion of *Shideler*.

²⁴²417 N.E.2d at 289.

for nominal damages could not be maintained without some evidence of disease.

Despite recognition by the *Shideler* court of authority supporting a discovery rule in cases where "the misconduct was of a continuing nature or concealed,"²⁴³ the court's heavy reliance on the dust and ingestion cases from New York made it inevitable that in subsequent delayed manifestation cases, courts would be heavily influenced to follow the impact rule. It is not surprising, therefore, that the majority in *Braswell v. Flinkote Mines, Ltd.*²⁴⁴ saw no reason to certify this issue to the Indiana Supreme Court.²⁴⁵

Given a second chance in *Barnes v. A.H. Robins Co.*,²⁴⁶ the Seventh Circuit Court of Appeals — apparently persuaded after reflecting on Judge Swygert's powerful dissent in *Braswell* — certified the statute of limitations discovery rule question to the Indiana high court. Relying on the "ascertainable damages" precedents, the supreme court adopted for protracted exposure, concealed harm cases a discovery rule which suspends operation of an accrual-based statute of limitations until the plaintiff can reasonably ascertain that the injury or impingement was caused by the defendant's product.

Although the court adopted a liberal rule by requiring the plaintiff's actual or constructive knowledge of a causal connection to the product for the action to accrue, the court did reiterate that the ten-year repose provision of the Indiana Product Liability Act still exists as an outer-cutoff of liability.²⁴⁷ Absent this provision, it is doubtful whether such a liberal holding would have been forthcoming.

As noted earlier, if the "ascertainable damages" rule is necessary in order to be fair to some tort claimants, it would appear to be required in tort cases generally. Accrual-based, as opposed to occurrence-based, statutes of limitations implicitly seek to accommodate plaintiffs' interests. These accrual statutes provide a "temporal window" within which the plaintiff is privileged to sue. Undiscoverable privileges are illusions, however. If the law grants a right and privilege, the grant should not be illusory. If additional steps are necessary to accommodate defendants' repose interests, it is probably better to enact repose statutes or other occurrence-based limitation legislation.

Perhaps Indiana needs a legal malpractice statute of limitations. The supreme court undoubtedly was correct in *Shideler* that the legislature

²⁴³*Id.* at 291.

²⁴⁴723 F.2d 527 (7th Cir. 1984). See *supra* 161-84 and accompanying text for the discussion of *Braswell*.

²⁴⁵723 F.2d at 531-33.

²⁴⁶476 N.E.2d 84 (Ind. 1985). See *supra* notes 51-68 and accompanying text for the discussion of *Barnes*.

²⁴⁷476 N.E.2d at 85.

was thinking only of health care providers when it enacted the [medical] malpractice statute.²⁴⁸ Nevertheless, the *Shideler* court's attempt to accommodate the legitimate interests of the legal profession by manipulating the general rules governing accrual-based statutes of limitations led to a confusing episode in Indiana law. It is hoped that the "ascertainable damages" rule now fully recognized as a discovery rule in *Barnes* will be applied generally as a fundamental tenet of Indiana tort law. In the absence of repose provisions in many tort law areas, however, it may be necessary to give plaintiffs in these cases somewhat less latitude in discovering the nature of their injuries than seems to be promised delayed manifestation plaintiffs by the *Barnes* case.²⁴⁹

²⁴⁸417 N.E.2d at 283. ("[T]he doctrine of ejusdem generis limits the application to the term 'or others' as used in said statute, to others of the medical care community.").

²⁴⁹As noted *supra*, notes 59-61 and accompanying text, the *Barnes* opinion appears to leave a good deal of room for finding that injured "protracted-exposure" victims have not had reasonable opportunities to discover the causal nexus between their diseases and the defendant's products. Within the context of Lahna Barnes' case, the court could have stressed far more forcefully the due diligence responsibility of victims who are aware that they are physically injured to seek out the exact causes of the harm. The supreme court's reticence to emphasize this point may prove to be an invitation for later courts to give plaintiffs in delay cases a large measure of the benefit of the doubt with respect to the accrual dates of their actions. See, e.g., *Anthony v. Abbott Labs.*, 490 A.2d 43 (R.I. 1985). In *Anthony*, the Rhode Island Supreme Court was asked by the federal district court, through certification, whether Rhode Island's discovery rule for delayed manifestation cases begins the statute of limitations when the plaintiff knew or should have known of a causal connection between product and injury, or whether it begins later when the plaintiff also knew or should have known of the manufacturer's wrongful conduct. The court ruled in favor of the later-starting limitation period, holding that knowledge of some wrongdoing is necessary, because a victim of a drug-related health impairment might very well believe that the injury suffered was unavoidable. The court noted that defendants are unlikely, under this rule, to be prejudiced by having to defend stale claims, because the relevant evidence is likely to be documentary in nature. Such evidence is unlikely to become unreliable with the passage of time. *Anthony*, a DES case, was recently followed in *California v. Kensinger v. Abbot Laboratories*, 217 Cal. Rptr. 313 (Cal. Ct. App. 1985).

The *Barnes* opinion, in this author's view, leaves the door open to similar holdings in Indiana (even though the first post-*Barnes* decision under Indiana law suggests otherwise). See *Miller v. A.H. Robins, Co.*, 766 F.2d 1102 (7th Cir. 1985) (discussed *supra* note 91). In *Barnes*, the court's holding states: "[T]he statute of limitations in such causes commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another." 476 N.E.2d at 87-88 (emphasis added). The emphasized language might suggest that discovery of *wrongful acts* should play some part in determining the accrual date of statutes of limitations. More importantly, both plaintiffs in the *Barnes* consolidation experienced early medical problems in which the Dalkon Shield played a known part. Lahna Barnes' shield was removed following the onset of her pelvic infection, and Sharon Neuhauser was correctly advised that the shield was likely to create physical injury (a miscarriage) during her unwanted pregnancy. Severe medical problems over the next several years followed for both women, but it was not until nine years after ascertainable injury in Barnes' case, and seven years in Neuhauser's that it was claimed that the women knew or could with

due diligence have known of the relationship of the shield to their impingements. In accepting the possibility of liability under such a scenario—without comment—the supreme court lends indirect support to the *Anthony* view that, until victims have reasonable opportunity to learn that their injuries are actionable, they have not truly “discovered the harm” for statute of limitations purposes.

Although such an extension of the *Barnes* rule might have relatively modest effects upon the liability exposure of Indiana product sellers—given the ten-year outer-cutoff of liability under the Product Liability Act—other tort defendants under a universal discovery rule would have less protection. Whether a review of the kinds of tort claims that are likely to arise under a universal tort discovery rule would reveal that this added exposure for some classes of Indiana defendants (non-sellers) would present for them a significant problem is a matter beyond the scope of this Article.

Is the Danger Really Open and Obvious?

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I. INTRODUCTION

Several states use variations of open and obvious danger concepts to determine the duties of manufacturers and injured parties involved in product liability actions.¹ The application of the concept varies from state to state. The more recent trend considers the obviousness of the danger as only one factor in determining whether a plaintiff has assumed the risk of injury.² The minority approach looks only at the obviousness of the danger and bars a plaintiff's recovery if it is determined that the danger was obvious.³

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¹See, e.g., *Turner v. Machine Ice Co.*, 674 P.2d 883 (Ariz.App. 1983); *Brown v. Sears, Roebuck & Co.*, 667 P.2d 750 (Ariz.App. 1983); *Union Supply Co. v. Pust*, 196 Col. 162, 583 P.2d 276 (1978); *Miscevich v. Commonwealth Edison Co.*, 110 Ill. App. 3d 440, 442 N.E.2d 338 (1982); *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277 (Ind. 1983); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982); *Brown v. North American Manufacturing Co.*, 176 Mt. 98, 576 P.2d 711 (1978). For a general discussion of this area of law, see Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

²See, e.g., *Miller v. Utica Mill Specialty Machinery Co.*, 731 F.2d 305 (6th Cir. 1984); *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 475 A.2d 1243 (1984); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982); *Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833 (S.D. 1984).

³See, e.g., *Miscevich v. Commonwealth Edison Co.*, 110 Ill. App. 3d 400, 442 N.E.2d 338 (1982); *Bryant-Poff, Inc. v. Hahn*, 454 N.E.2d 1223 (Ind. Ct. App. 1982). The open and obvious danger rule gained momentum as a complete bar to recovery in *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950). In *Campo*, the court stated, "[T]he manufacturer of a machine or any other article, dangerous because of the way it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers." *Id.* at 471, 95 N.E.2d at 803. *Campo* was later overruled by the New York Court of Appeals in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In place of the rigid no-duty rule, the *Micallef* court adopted a reasonable care test. Under the test, the manufacturer's actions would be reasonable if the cost of installing safety devices outweighed the benefit resulting from their installation. *Id.* at 386, 348 N.E.2d at 578, N.Y.S. 2d at 121. The openness and obviousness of a danger was a factor considered in determining whether the "plaintiff exercised that degree of care as was required under the circumstances." *Id.* at 387, 348 N.E.2d at 578, 384 N.Y.S. 2d at 122.

Courts following the more recent trend have noted that the no-duty and obvious danger rule protects manufacturers who sell products with dangerous, but obvious, design defects, encourages manufacturers to be outrageous in their design and to eliminate safety

One test used to determine whether a danger is obvious is an objective test, focusing on the knowledge and experience of a person with knowledge similar to the plaintiff's rather than on the actual subjective knowledge of the injured person.⁴ Under this test, the obviousness of the danger is based on the obviousness to a person with the plaintiff's knowledge, not to an experienced or more knowledgeable person.⁵ This approach treats the question of obviousness as a question of fact for the jury.⁶

The question of obviousness has also been treated as a question of law. Under this approach, plaintiffs are barred from recovery because the court, upon examining the evidence, determines that the danger was obvious as a matter of law.⁷ It is this last approach that has come under increasing attack in recent years.⁸ Indiana courts have followed the latter approach exclusively and treat the issue of open and obvious danger as a question of law.⁹ The recent case of *Corbin v. Coleco Industries, Inc.*¹⁰ does not alter this approach, but offers new factors for consideration in determining whether a danger really is open and obvious. The use of these factors serves to mitigate the harsh results obtained previously under Indiana's open and obvious danger rule and creates hope that Indiana will be brought a step closer to the modern trend in this area of law. This Article examines the development and use of the no-duty open and obvious danger rule in Indiana and the impact the Corbin decision may have on that rule.

II. DEVELOPMENT OF THE OPEN AND OBVIOUS DANGER RULE IN INDIANA

*Bemis Co., Inc. v. Rubush*¹¹ is the leading case in Indiana on the

devices and make hazards more obvious, and shifts the economic loss to the injured party in spite of the manufacturer's lack of care in design. See *Holm v. Sponco Mfg. Inc.*, 324 N.W.2d at 213.

⁴*Ford Motor Co. v. Rodgers*, 337 So. 2d 736 (Ala. 1976). Indiana courts recently reaffirmed the use of an objective test to determine whether a danger is open and obvious. In *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524 (Ind. Ct. App. 1984), the court stated, "Whether a defect or danger is open and obvious is an objective test, based upon what the user *should* have known." *Id.* at 527 (citing *American Optical Company v. Wiedenhamer*, 457 N.E.2d 181 (Ind. 1983)). See also *Angola State Bank v. Butler Manufacturing Co.*, 475 N.E.2d 717, 718 (Ind. Ct. App. 1985).

⁵475 N.E.2d at 718.

⁶*Id.*

⁷See *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981).

⁸See, e.g., *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979); *Holm v. Sponco Mfg. Inc.*, 324 N.W.2d 207 (Minn. 1982); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

⁹*Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981); *Hoffman v. E. W. Bliss Co.*, 448 N.E.2d 277, 284 (Ind. 1983); *Bryant-Poff, Inc. v. Hahn*, 454 N.E.2d 1223, 1225 (Ind. Ct. App. 1982).

¹⁰748 F.2d 411 (7th Cir. 1984).

¹¹427 N.E.2d 1058 (Ind. 1981).

application of the open and obvious danger rule in product liability actions. The plaintiff in *Bemis* was injured when a shroud from a batt packing machine descended and struck the plaintiff in the head. The case was tried by the jury under a strict liability theory. The defendant was found liable and appealed¹² on the ground that the trial court had improperly applied the law of strict liability.¹³ The court of appeals affirmed the trial court's application of the law,¹⁴ and the defendant sought transfer to the Indiana Supreme Court.¹⁵ On appeal, the plaintiff conceded that the danger in the descending shroud was open and obvious. However, the plaintiff contended that the machine should have been designed so that the shroud could not descend when an object or person was in its path.¹⁶ The defendant argued that it could not be held liable under a strict liability theory because the danger was open and obvious; therefore, it had no duty to warn of the obvious danger.¹⁷

The Indiana Supreme Court found that the lower courts had incorrectly interpreted Restatement (Second) of Torts section 402A strict liability law.¹⁸ The court noted that section 402A imposes liability upon

¹²*Id.* at 1059.

¹³*Id.* The shift in focus that occurs in this part of the opinion is extremely important. The plaintiff focused on the failure to equip the machine with proper safety devices. The defendant focused on the duty to warn. The court shifted to the defendant's focus, which resulted in the application of the no-duty open and obvious danger rule to all types of strict product liability actions regardless of whether the theory was one of failure to warn or defective design.

¹⁴*Id.* at 1059. The court of appeals' decision recognized that modern technology had enabled the development of products that utilized "complex and sophisticated technology, incomprehensible to all but practitioners of the art, [where] the dangers are not so obvious and may not be appreciated by an ordinary consumer with ordinary knowledge in the community, even though the dangers may be appreciated by the sophisticated." *Bemis Co., Inc. v. Rubush*, 401 N.E.2d 48, 57 (Ind. Ct. App. 1980), *vacated*, 427 N.E.2d 1058 (Ind. 1981). The court of appeals noted that the proper role of open and obvious dangers was as a factor to be considered in deciding whether a product was unreasonably dangerous. Because this decision involved an examination of the facts and circumstances presented, it was deemed a jury question. The test under this approach was objective. The jury would consider the evidence presented on what the ordinary knowledge of the community was concerning the product, the feasibility of safeguards, the plaintiff's appreciation of the danger, and any other relevant factors. The ultimate issue was whether the product "was in a defective condition unreasonably dangerous, that is, dangerous to an extent beyond that which is contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to the product's characteristics." 401 N.E.2d at 57.

¹⁵427 N.E.2d at 1059.

¹⁶*Id.* at 1060-61.

¹⁷*Id.* at 1060.

¹⁸*Id.* at 1059. *Bemis* was decided under Restatement (Second) of Torts section 402A strict liability which states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and

manufacturers only when the product is unreasonably dangerous.¹⁹ "Unreasonably dangerous" was defined in *Bemis* as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."²⁰ If a product was not unreasonably dangerous, no legal action was possible.²¹

The court interpreted section 402A to permit recovery only where a defect is "hidden and not normally observable. . . ."²² Where a defect is observable, the manufacturer would have no duty to warn, even if the manufacturer had actual or constructive knowledge of the defect.²³ Because the plaintiff was aware of the danger presented by the descending shroud, the Indiana Supreme Court found that the trial court had erred in not instructing the jury on the open and obvious danger rule and in failing to define unreasonably dangerous.²⁴ Based on this finding, the court vacated the court of appeals decision and ordered the trial court to enter judgment on behalf of the defendant.²⁵ According to Justice

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- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
 - (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Following the *Bemis* decision, 402A strict liability was codified at IND. CODE § 33-1-1.5-3 (Supp. 1985). The Indiana version, however, limits the user or consumer to "the class of persons that the seller should reasonably foresee." *Id.*

¹⁹*Bemis*, 427 N.E.2d at 1061.

²⁰*Id.* (An expert witness in *Bemis* defined a risk or hazard as unreasonable "if it could be removed and the cost of removal is not significant nor the cost of removal does not [sic] seriously reduce the utility of the product." *Id.* at 1063.)

²¹*Id.* at 1061.

²²*Id.*

²³*Id.* It is interesting to note the effect of this rule. Rather than encouraging the design and construction of safe products, it encourages manufacturers to make defects or dangers as open and blatant as possible in order to avoid liability. The more blatant the danger, the less the chance of liability. Other jurisdictions have avoided this pitfall by making the open and obvious danger merely a factor to be considered rather than a bar to recovery as a matter of law. See *supra* notes 2 and 3 and accompanying text.

²⁴*Bemis*, 427 N.E.2d at 1064.

²⁵*Id.* The supreme court apparently relied on *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), in overruling the Indiana Court of Appeals' decision. However, nowhere in the Indiana Supreme Court majority decision is it acknowledged or mentioned that the New York courts had overturned the *Campo* decision in *Micallef v. Miehle*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

The *Bemis* dissent by Justice Hunter acknowledged that *Campo* had been overruled. *Bemis*, 427 N.E.2d at 1067. Justice Hunter noted that the rule adopted by the majority defeated the purposes of 402A strict liability by prohibiting recovery as a matter of law even though a product was unsafe. *Id.* at 1067-68 (Hunter, J., dissenting). Justice DeBruler's

Hunter, who dissented, this order indicated that the majority had adopted the position that recovery for injuries suffered at the hands of an " 'open and obvious danger' are barred as a matter of law" in Indiana.²⁶

III. DEFINING THE DANGER

Two years after *Bemis*, the Indiana Supreme Court again addressed the open and obvious danger rule in *Hoffman v. E.W. Bliss Company*.²⁷ The *Hoffman* decision did not reevaluate the efficacy of the no-duty rule but focused on what should be considered an open and obvious danger.²⁸

In *Hoffman*, the plaintiff's fingers were crushed and severed when the ram of a punch press suddenly descended without being activated.²⁹ The case was tried before a jury, and a verdict was returned in favor of the defendants. The plaintiff appealed.³⁰

On appeal, the defendant argued that the open and obvious danger rule precluded recovery by the plaintiff.³¹ The plaintiff had testified that he knew of the danger posed by the descending ram³² and that the machine was not functioning properly.³³ The Indiana Supreme Court found that this testimony did not bring the case within the purview of the open and obvious danger rule.³⁴

The court focused on the interpretation of the word "danger."³⁵ It was obvious that the ram descended with tremendous force, but it was not obvious that the ram would descend without being activated by the operator.³⁶ This distinction, in the eyes of the court, was critical. The unactivated descent of the ram was found to be hidden defect which would not excuse the manufacturer from liability.³⁷ Hoffman had introduced evidence that the ram's descent could have been caused by an

dissenting opinion also noted that "[o]pen and obvious dangers may be reasonable, and again they may not be." *Id.* at 1065 (DeBruler, J., dissenting).

²⁶*Id.* at 1066. While the majority did not expressly state that recovery was barred as a matter of law, the dissent properly noted that an erroneous instruction would only have required a new trial. *Id.* (Hunter, J., dissenting).

²⁷448 N.E.2d 277 (Ind. 1983).

²⁸*Id.* at 285.

²⁹*Id.* at 280.

³⁰*Id.* at 278.

³¹*Id.* at 285.

³²*Id.*

³³*Id.* at 280.

³⁴*Id.* at 285.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.* The activation of the machine by the operator in *Bemis* is apparently the crucial factor that differentiates that case from *Hoffman*. In *Bemis*, the plaintiff focused his claim on the lack of safety devices, whereas the *Hoffman* plaintiff focused his claim on an alleged malfunction or uninitiated descent of the ram.

uninitiated double trip³⁸ and that no warning was provided informing the user of this possibility. Therefore, the court concluded that the theory espoused by Hoffman and the evidence introduced in support precluded a finding that Hoffman's injury was caused by an open and obvious danger.³⁹ The court declared that "[a] careful examination of the evidence in each case is necessary to determine whether the danger in the product is truly and entirely open and obvious."⁴⁰

The *Hoffman* decision created hope that the open and obvious danger rule would be used sparingly as a method to preclude recovery as a matter of law for injuries suffered from defects in a product. However, this hope was dashed by the *Bryant-Poff, Inc. v. Hahn*⁴¹ decision in 1982.

The plaintiff in *Hahn* was injured while attempting to paint a rust spot on a grain elevator by reaching between a chain and sprocket mechanism. The plaintiff was on a platform ninety feet above the ground when the chain and sprocket device was activated from an operator's station at ground level. The plaintiff's arm was pulled into the system and crushed. The injuries resulted in a below the elbow amputation.⁴² The plaintiff brought suit against the manufacturer of the device on theories of negligence and strict liability.⁴³ On appeal, the judgment in favor of the plaintiff was reversed on the basis that the open and obvious danger rule precluded recovery as a matter of law.⁴⁴ The Indiana Supreme Court denied transfer, in effect affirming the court of appeals' reversal of the trial court judgment.⁴⁵

The court of appeals had reversed the trial court judgment because it found that the chain and sprocket mechanism presented an open and

³⁸*Hoffman*, 448 N.E.2d at 285. (The defendant introduced evidence that the descent of the ram could have been caused by Hoffman's inadvertent activation of the ram.).

³⁹*Id.*

⁴⁰*Id.* This comment places the majority in a precarious position. The *Bemis* dissent had noted that the majority rule lacked flexibility. This is the problem arising in *Hoffman* where the facts are substantially similar to the *Bemis* facts, and yet, the majority reaches an opposite conclusion. The court's statement does, however, raise the question of just how much fact review and weighing a court may do under the open and obvious danger rule. Justices Hunter and DeBruler concurred in a separate opinion in the *Hoffman* majority result. Justice Hunter again pointed out the problems with the open and obvious danger rule as adopted in Indiana and agreed that if the rule was to exist, it should be narrowly construed. *id.* at 288 (Hunter, J., concurring).

⁴¹454 N.E.2d 1223 (Ind. Ct. App. 1982). (The court of appeals had earlier reversed in an unpublished memorandum decision reported at 443 N.E.2d 1266.) The Indiana Supreme Court denied transfer of this case, see *Hahn*, 453 N.E.2d 1171 (Ind. 1983), where Justice Hunter wrote a dissenting opinion to the court's denial of transfer.

⁴²454 N.E.2d at 1224.

⁴³*Id.*

⁴⁴*Id.* at 1225.

⁴⁵453 N.E.2d 1171 (Ind. 1983).

obvious danger.⁴⁶ This was in spite of the fact that a jury could have found that the unguarded chain and sprocket mechanism created an unreasonably dangerous condition.⁴⁷ The Indiana Supreme Court's affirmation of this decision expanded the scope of the open and obvious danger rule.

In *Bemis*, the court had taken the position that the product was not unreasonably dangerous because the ordinary consumer or user of the product was capable of recognizing the dangers presented by the descending shroud.⁴⁸ The *Hoffman* decision reaffirmed this approach by reiterating the maxim that manufacturers were liable for injuries caused by placing products in the stream of commerce that were in a "defective condition unreasonably dangerous."⁴⁹ The *Hahn* decision obliterated the theory underlying this principle by declaring that the open and obvious danger rule precluded recovery even when the danger made the product unreasonably dangerous.⁵⁰

Justice Hunter recognized the inconsistency between the *Hahn* decision and the *Bemis* and *Hoffman* decisions.⁵¹ Justice Hunter noted that, in the earlier decisions, the court had found that the product was

⁴⁶454 N.E.2d 1225. The court of appeals relied on *Coffman v. Austgen's Electric, Inc.*, 437 N.E.2d 1003 (Ind. Ct. App. 1982). In *Coffman*, a twelve-year-old boy reached into a grain auger's hopper to remove a bird's nest. The auger was not running when the boy reached into the hopper. However, the auger was inadvertently started when the boy had his arm in the hopper. The boy's hand was badly mangled as a result of the accident. *Id.* at 1005.

The plaintiffs sued on the basis of the defendants' negligent failure to place guards over the auger shaft and for improper design of the control panel and on a strict products liability theory. *Id.* The case proceeded to trial, and the court refused to read the plaintiffs' instruction on duty to warn because it omitted language concerning open and obvious dangers. *Id.* at 1008. The court of appeals affirmed the trial court's decision to omit the plaintiffs' instruction because it failed to state that manufacturers have no duty to warn of open and obvious dangers. *Id.* The court of appeals, without elaboration, also stated: "Clearly, the potentiality of danger inherent in sticking one's hand in an auger which has the propensity to move is open and obvious to all." *Id.*

The *Hahn* court's reliance on *Coffman* is interesting because in *Hahn* the plaintiff was barred from recovery as a matter of law, and the case never got to the jury. In *Coffman*, however, the case was tried, and the open and obvious danger issue arose as a result of a tendered jury instruction. Presumably, if the plaintiff in *Coffman* had submitted a proper instruction, the jury would have been left to determine whether under the facts and circumstances presented, the danger was truly open and obvious. In *Hahn*, the opposite is true because the court determined, as a matter of law, that the danger was open and obvious.

⁴⁷*Hahn*, 454 N.E.2d at 1225.

⁴⁸427 N.E.2d at 1064. (Although the *Bemis* decision does not specifically state that the product was not unreasonably dangerous, that inference is created through the court's definition and use of the term unreasonably dangerous.)

⁴⁹448 N.E.2d at 281.

⁵⁰454 N.E.2d at 1225.

⁵¹*Hahn*, 453 N.E.2d at 1171-72 (Hunter, J., dissenting).

not unreasonably dangerous because the danger was open and obvious.⁵² In *Hoffman*, the court in refusing to find the danger open and obvious left the issue for the jury to decide because of conflicting evidence.⁵³ In *Hahn*, there was evidence that the product was unreasonably dangerous because of the absence of guards and violations of industry standards.⁵⁴ The evidence also showed that the chain and sprocket were not in motion when Hahn attempted to paint the rust spot and that the chain was loose until the machine was activated.⁵⁵ There was no dispute that the danger from the chain and sprocket mechanism was open and obvious when it was moving.⁵⁶ The plaintiff, however, was proceeding on the theory that warnings should have alerted users of the need to disconnect the power prior to working near the chain on the platform to avoid activation by another person and that instructions of how to disconnect the power should have been provided.⁵⁷ Because the evidence in the *Hahn* case created a question of whether the danger from a non-moving chain really was open and obvious, Justice Hunter concluded the case was analogous to the *Hoffman* case and the jury should have been permitted to determine whether the danger presented by the nonmoving mechanism was "truly and entirely open and obvious."⁵⁸

The definition of an open and obvious danger had thus become closely tied to the use of the open and obvious danger rule as a means

⁵²*Id.* at 1172.

⁵³*Id.*

⁵⁴*Id.* at 1173.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.* at 1174.

⁵⁸*Id.* at 1175 (quoting *Hoffman*, 440 N.E.2d at 285). The Indiana Supreme Court also addressed the issue of open and obvious dangers in *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181 (Ind. 1983). In *American Optical*, the court held that the danger of an eye-glass lens breaking and injuring the wearer's eye was a risk that was "obvious to all." *Id.* at 188. The court's decision was based on the lack of any evidence that the safety glasses were defective or dangerous or improperly designed. Without evidence of a defect, there could be no duty to warn. The only danger presented was the risk that something could strike the glasses causing them to shatter or break. It was this risk that the court determined was obvious to all users and required no warning. Again, this approach encourages manufacturers to omit warnings of known dangers. The better approach, and one consistent with the protection of the public, was outlined by the concurring opinion. *Id.* at 188-89 (DeBruler, J., concurring).

Justice DeBruler, joined by Justice Hunter, concurred in the result obtained by the majority but for different reasons. *Id.* at 188. The manufacturer of the safety glasses knew of the limitations of the glasses and therefore had a legal duty to supply adequate warnings concerning the dangers associated with the use of the safety glasses and the precautions to be taken. *Id.* The evidence presented at trial showed that the manufacturer had supplied warnings with each pair of glasses. However, these warnings were removed by the injured plaintiff's plant prior to distributing the glasses to the workmen. Therefore, the evidence was insufficient to support a finding that the glasses were defective because of a lack of adequate warnings by the manufacturer. *Id.* at 189.

to preclude recovery. Following the *Hahn* decision, the determination that a danger was open and obvious would bar recovery even when the danger presented was recognized as being so great that it made the product unreasonably dangerous. The rule, as applied in *Hahn*, creates the absurd result of permitting manufacturers to leave safety devices and guards off of their products deliberately to ensure that the dangers presented in using the product will be obvious.⁵⁹ Under this approach, the determination of whether a danger is open and obvious attains increased importance and significance, and the no-duty open and obvious danger rule becomes increasingly virulent.

IV. THE RULE'S EXTENSION TO NON-PRODUCT ACTIONS

The scope of Indiana's open and obvious danger rule was further broadened by the Indiana Court of Appeals in *Law v. Yukon Delta, Inc.*⁶⁰ In *Law*, the plaintiff was injured when he slipped and fell on the defendant's premises while there for business purposes. He admitted in his deposition that he was aware the floor was wet and assumed that it was slippery because it was made of concrete. The plaintiff, nevertheless, proceeded across the floor without seeking help. The defendant was granted summary judgment based on the open and obvious danger rule. The plaintiff appealed.⁶¹

On appeal, the plaintiff argued that the open and obvious danger rule applied only to actions based on a strict product liability theory.⁶² The Indiana Court of Appeals, however, determined that the *Bemis* decision supported the application of the rule to all types of actions, whether based on a negligence theory or on a strict products liability theory. This determination was based on the Indiana Supreme Court's use in *Bemis* of the phrase "[i]n the area of products liability, based upon negligence or based upon strict liability."⁶³ This language was used to indicate that the open and obvious danger rule was meant to apply to all products liability actions regardless of whether the action was based on negligence or strict liability.⁶⁴ Because the rule was applied to product liability negligence actions, the *Law* court reasoned that it could be extended to apply to negligence actions that did not involve a product.⁶⁵ The court found this extension logical because the prima facie evidence requirements were the same for all types of negligence actions, and the open and obvious danger rule was a "logical factor to consider when

⁵⁹*Hahn*, 453 N.E.2d at 1174 (Hunter, J., dissenting to denial of transfer).

⁶⁰458 N.E.2d 677 (Ind. Ct. App. 1984).

⁶¹*Id.* at 678.

⁶²*Id.* at 678-79.

⁶³*Id.* (quoting *Bemis Co., Inc. v. Rubush*, 427 N.E.2d at 1061).

⁶⁴*Law*, 458 N.E.2d at 679.

⁶⁵*Id.*

determining whether a person has acted in an ordinary and reasonable fashion."⁶⁶

Judge Staton, in his dissenting opinion, noted that the majority's extension of the open and obvious danger rule to negligence actions was unnecessary.⁶⁷ Indiana negligence law already required three elements for recovery: 1) defendant owed a duty to the plaintiff; 2) defendant failed in performing that duty; and 3) the failure to perform the duty resulted in the plaintiff's injury.⁶⁸ Under negligence law, the plaintiff's unreasonable failure to recognize an obvious risk or danger would preclude recovery because of the plaintiff's contributory negligence.⁶⁹ The plaintiff's subjective knowledge of a danger would also preclude recovery under the doctrine of incurred risk.⁷⁰ Thus, according to Judge Staton, application of the open and obvious danger rule was unnecessary in the *Law* case.⁷¹

This issue was again addressed in *Bridgewater v. Economy Engineering Company*.⁷² In *Bridgewater*, a worker suffered fatal injuries when the guardrails of a ladder on which he was working suddenly collapsed and caused him to fall.⁷³ A negligence action was brought against the distributor of the ladder. The defendant was granted summary judgment on the basis that any defect in the guardrail latching device was, as a matter of law, open and obvious and the product was, therefore, not unreasonably dangerous.⁷⁴

On appeal, the court of appeals refused to extend the *Bemis* open and obvious danger rule to negligence actions even when a product was involved.⁷⁵ The court noted that extending the application of the open and obvious danger rule to negligence actions created an anomaly in Indiana law.⁷⁶ The Indiana Supreme Court had declared that the determination of whether a product had a concealed or hidden danger was a question of fact for the jury in negligence actions.⁷⁷ If the court utilized the open and obvious danger rule to bar recovery in negligence actions as a matter of law, the result would be that the court would actually be determining whether a defect was hidden or concealed.⁷⁸ The

⁶⁶*Id.*

⁶⁷*Id.* at 680 (Staton, J., dissenting).

⁶⁸*Id.* at 681.

⁶⁹*Id.* (citing *Kroger Co. v. Haun*, 177 Ind. App. 403, 410-11, 379 N.E.2d 1004, 1009 (1978)).

⁷⁰*Id.* (citing *Kroger Co. v. Haun*, 177 Ind. App. at 415-16, 379 N.E.2d at 1012).

⁷¹*Id.*

⁷²464 N.E.2d 14 (Ind. Ct. App. 1984), *vacated*, 486 N.E.2d 484 (Ind. 1985).

⁷³*Id.* at 15.

⁷⁴*Id.* at 16.

⁷⁵*Id.* at 18.

⁷⁶*Id.*

⁷⁷*Id.* (citing *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964)).

⁷⁸*Id.*

Bridgewater court questioned the potential result that the parties could control whether the court or jury decided that issue in negligence cases by merely phrasing the issue as one of an open and obvious danger or one of a concealed danger.⁷⁹ Because the Indiana Supreme Court could not have intended this type of result, the *Bridgewater* court disputed whether the open and obvious danger rule should apply to both strict products liability actions and negligence actions.⁸⁰

This conflict in the appellate courts' application of the open and obvious danger rule to negligence cases was resolved by the Indiana Supreme Court when it granted transfer in *Bridgewater v. Economy Engineering Co.*⁸¹ The court granted transfer in part to clarify the open and obvious danger rule's application to negligence actions.⁸²

As a preliminary matter, the Indiana Supreme Court clarified the *Bemis* holding by stating that the court had not intended the open and obvious danger issue always to be decided as a matter of law. Rather,

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹486 N.E.2d 484 (Ind. 1985). The application of the open and obvious danger rule to product liability actions based on negligence presents unique problems in Indiana. Indiana recently adopted comparative fault in negligence actions. IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985). Under this Act, the fault of the defendant and plaintiff are to be compared to determine the liability, if any, of the defendant. If a plaintiff is over 50% at fault, he is denied any recovery under the Act. IND. CODE § 34-4-33-5(a)(2) (Supp. 1985).

The efficacy of the open and obvious danger rule under comparative fault principles can be seriously questioned. The open and obvious danger rule creates an artificial condition which places full blame of an injury on the plaintiff even though the defendant is really partially at fault. These type of no-duty rules clash with the very purpose of comparative fault statutes and therefore should not remain viable under comparative fault. Indiana courts should recognize this clash and determine that even if the open and obvious danger rule would have applied to product actions based on negligence under *Law*, it has no place in a comparative fault system. The rule should be only one factor considered when comparing the fault of the defendant and plaintiff. *Contra* SCHWARTZ, COMPARATIVE NEGLIGENCE 202-03 (1974).

This approach would create problems because Indiana's Comparative Fault Act does not apply to product liability actions based on strict liability. If a plaintiff pursues a product action based on theories of negligence and strict liability, the court may be faced with the unenviable task of determining that the strict liability claim is barred by the open and obvious danger no-duty rule while the negligence claim should proceed to the jury for a fault comparison to determine the liability of the defendant to the plaintiff, if any.

A solution to the problem may be to place the open and obvious danger rule in its proper place in both types of product actions: to treat it as a factor to be considered in determining whether the plaintiff incurred the risk of injury in using the product in strict liability actions, and in negligence actions as a factor in determining whether the plaintiff was contributorily negligent or incurred the risk. This avoids the problem of treating various types of product actions differently and allows the consideration of the openness and obviousness of a danger when determining the liability of the defendant. *See infra* notes 107-23 and accompanying text.

⁸²486 N.E.2d at 485.

it was to be treated as a matter of law only in cases involving a set of facts that were not in conflict and where no general issue was left as to "any material fact except for the question of whether the danger was open and obvious."⁸³ Under the facts presented in *Bridgewater*, the Indiana Supreme Court agreed with the court of appeals' statement that the question of whether the danger was open and obvious was the same as whether the danger was concealed or hidden.⁸⁴ The court did not discuss the factors to be considered in making that determination. However, the court decided that the open and obvious danger rule would not be extended to all negligence actions.⁸⁵ In light of this ruling, the court's conclusion that *Bridgewater's* negligence action should be dismissed appears misplaced.⁸⁶ However, the court evidently determined that all product actions, whether based on strict liability or negligence, would be subject to the open and obvious danger defense.⁸⁷ The court did not discuss the distinction being made between general negligence actions and product-based negligence actions or the repercussions such a distinction could have in the future. Therefore, the scope of the application of the open and obvious danger rule and the determination of what constitutes an open and obvious danger remain major issues in Indiana law and may be significantly affected by the recent Seventh Circuit Court of Appeals decision in *Corbin v. Coleco Industries, Inc.*⁸⁸

V. THE *Corbin* DECISION

In *Corbin*, the plaintiff, Mr. Corbin, became the owner of a used Coleco swimming pool. Mr. Corbin placed the pool in his backyard and filled it to a depth of about four feet. One evening, Mr. Corbin jumped onto the lip of the pool (a six-inch wide flat rim running around the top edge), balanced himself, and dove in. He intended to do a "belly flopper," but for some reason his waist bent in mid-air and he entered the water head first. He hit his head on the bottom of the pool and

⁸³*Id.* at 488.

⁸⁴*Id.*

⁸⁵*Id.* at 489. In doing so, the court explicitly adopted part of the language used by Judge Staton in his dissenting opinion in *Law*. See *supra* notes 67-71 and accompanying text.

⁸⁶486 N.E.2d at 489.

⁸⁷Justice Shepard (concurring in part, dissenting in part) was also surprised by the majority's finding that the trial court had properly used the open and obvious danger rule to grant summary judgment on the negligence theory. He noted that the majority did not discuss the distinction it was making between non-product negligence actions and product negligence actions. He approved of the court's ruling that the open and obvious danger rule would not apply to general negligence actions but dissented on the court's finding that the product-based negligence action was properly dismissed. 486 N.E.2d at 490-91.

⁸⁸748 F.2d 411 (1984).

suffered a fracture dislocation in vertebrae C-5 and C-6, resulting in quadriplegia. At the time of the accident, he was twenty-seven years old and in good health.⁸⁹

Mr. Corbin and his wife filed a complaint against Coleco based in part on the theories of negligence and strict product liability. Coleco moved for summary judgment and the district court held that it was obviously dangerous for a six-foot man to dive into four feet of water.⁹⁰ The court held additionally that Coleco had no duty to warn of the open and obvious dangers and that a product is not defectively designed when its dangerous properties are patent. The district court found that the cause of Corbin's injuries was his own error of judgment in executing a shallow dive, implicitly concluding that a missing or defective warning was not a proximate cause of the injury. Finding no genuine issue of material fact, the district court granted Coleco's motion for summary judgment.⁹¹ Mr. Corbin appealed and the Seventh Circuit Court of Appeals, construing Indiana law, reversed the decision.⁹²

On appeal, Coleco vigorously asserted that the danger of diving into four feet of water was open and obvious. The Seventh Circuit Court of Appeals noted that if this were true, it would be a complete defense to a charge of negligent breach of duty to warn of the danger because there would be no such duty.⁹³ However, the court found "that Corbin put on the record before the district court evidence that the danger of serious spinal cord injury from diving into shallow water is not open and obvious and that this evidence is sufficient to preclude summary judgment for Coleco on the basis of the open and obvious defense."⁹⁴

The evidence presented by Mr. Corbin included expert testimony that users of swimming pools:

are aware of a general safety principle or homily against diving into shallow water. . . . The problem is that people associate that warning or general admonition with a couple of different things. They associate it with that you shouldn't dive into unknown waters, especially not unknown waters that are shallow, because there may be an object lurking there which you can strike They also associate the general admonition against diving as [sic] to mean that in a shallow body of water, some dives may create injury, some types of dives. The other important thing that the users of the pool typically carry in their heads is the belief that there is a safe and proper particular way to

⁸⁹*Id.* at 412-13

⁹⁰*Id.* at 413.

⁹¹*Id.*

⁹²*Id.* at 417, 421.

⁹³*Id.* at 417 (citing *Bemis Co., Inc. v. Rubush*, 427 N.E.2d at 1061).

⁹⁴*Id.* at 417.

dive into pools of approximate or bodies of water of that approximate depth of three and a half feet. Flat and shallow dives with arms outstretched are common knowledge and one of the most rudimentary forms of diving that people learn. People have the belief that if they dive into water in approximately the depth we are concerned with here, that if they dive in a fairly shallow dive, with their hands outstretched in front of them, that in the event they strike the bottom, their hands will absorb or cushion the blow, that the only thing they will do is strike their hands on the bottom.⁹⁵

The court went on to maintain:

The crucial point made in this testimony is that even though people are generally aware of the danger of diving into shallow water, they believe there is a safe way to do it, namely, by executing a flat shallow dive. If people do in fact generally hold such a belief, then it cannot be said, as a matter of law, that the risk of spinal injury from diving into shallow water is open and obvious. Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious.⁹⁶

Deposition testimony by Corbin indicated that Corbin was aware of the depth of the pool and that it might be too shallow to dive in. This testimony revealed clearly that Corbin knew of some general danger in diving into the shallow water. However, the Seventh Circuit stated that this testimony was "inconclusive on the crucial points: whether he knew that he risked serious spinal cord injury, possibly resulting in paraplegia or quadriplegia, and whether he believed that it was safe to dive as long as the dive was flat and shallow."⁹⁷ At one point in his deposition, Corbin indicated that he had jumped wrong. It was clear that Corbin intended to perform a flat, shallow dive rather than the dive that resulted. The Seventh Circuit noted that this testimony, along with the expert witness' testimony that people generally believe that flat, shallow dives into shallow water are safe, created a genuine issue of material fact as to whether Corbin knew that he risked spinal injury by diving into shallow water, even if he attempted a flat, shallow dive. If he did not

⁹⁵*Id.* at 417 (quoting deposition).

⁹⁶*Id.* at 417-18.

⁹⁷*Id.* at 418.

know this, then a conspicuous warning on the side of the pool could very well have deterred him from diving. The court concluded that the summary judgment for Coleco on the basis of Corbin's knowledge of the danger was inappropriate.⁹⁸

The Seventh Circuit also addressed the issue of whether the Coleco swimming pool was an unreasonably dangerous product. The court stated that whether a product is in an unreasonably dangerous defective condition is a question of fact.⁹⁹ The Seventh Circuit stated that the district court had found that Corbin's injuries were caused by his own error of judgment in executing a shallow dive that he knew to be dangerous. Therefore, the district court had implicitly concluded as a matter of law that Corbin's injuries were not caused by a defect in the pool unreasonably dangerous to users.¹⁰⁰ The Seventh Circuit found this to be error because there was evidence that the pool was in a condition that made it exceptionally dangerous, well beyond what the ordinary user of swimming pools would contemplate and well beyond any danger that Corbin actually contemplated, and that this defect was the cause of Corbin's injuries.¹⁰¹

The Seventh Circuit relied on testimony by an expert witness indicating that the outer lip of the pool would wobble, thus affecting an individual's ability to control a dive. The court noted that Corbin might have had intimate knowledge of the construction of the pool without knowing that the lip wobbled when stood on or that a wobbling pool lip would impair a diver's control. His knowledge of the depth of the water and the general danger of diving into shallow water did not show that he knew the extreme danger of diving into shallow water from a wobbly platform.¹⁰² Coleco maintained that Corbin's strict liability claim was defeated by the open and obvious danger rule of *Bemis*. In rejecting this claim, the appellate court stated:

Even if it were open and obvious that there is some danger in diving into shallow water . . . we cannot say on this record as a matter of law that it was open and obvious that the lip of Corbin's pool wobbled or that a wobbly pool lip increases the danger of a dive from it. Thus, the open and obvious rule does not defeat Corbin's strict liability theory at the summary judgment stage.¹⁰³

The court concluded, "we think the record shows that it is a genuine issue of material fact whether the pool contained a latent defect making

⁹⁸*Id.*

⁹⁹*Id.* at 419.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 419-20.

¹⁰²*Id.* at 420.

¹⁰³*Id.* at 420-21.

it unreasonably dangerous to divers, notwithstanding the general danger of diving into shallow water."¹⁰⁴

VI. THE IMPACT OF CORBIN ON INDIANA LAW

The *Corbin* decision potentially has two areas of major impact on Indiana law. First is the federal court's acceptance that the open and obvious danger rule applies to product liability actions based on negligence; second are the factors to be considered when determining whether a danger is truly open and obvious as a matter of law.

A. Application of the Open and Obvious Danger Rule to Negligence Actions

The *Corbin* decision addressed the application of the open and obvious danger rule to both a products liability case based on negligent failure to warn and on strict liability. The *Corbin* court did not debate whether *Bemis* intended to encompass negligence-based actions or only actions based on a strict liability theory.¹⁰⁵ Instead, the court simply stated that if diving into four feet of water was open and obvious, then "it is a complete defense to a charge of negligent breach of a duty to warn of the danger."¹⁰⁶

This determination was compatible with the Indiana Supreme Court's subsequent ruling in *Bridgewater*. However, the application of the open and obvious danger rule to product liability actions based on negligence may create substantial problems.

Indiana recently passed comparative fault legislation.¹⁰⁷ Other states adopting comparative fault have struggled with the existence of no-duty rules¹⁰⁸ because they circumvent fault comparison and thwart the very

¹⁰⁴*Id.* at 421.

¹⁰⁵The *Corbin* decision was handed down prior to the Indiana Supreme Court's decision in *Bridgewater*. The federal court's acceptance of the application of the open and obvious danger rule in product negligence actions was therefore not based on that decision. The court conducted an examination to determine whether a negligent failure to warn action had survived the passage of the Products Liability Act. *Id.* at 416-17. The court concluded that it had and that the products act would govern the action only so far as the substantive provisions of the Act conflicted with the common law. The accident had occurred in 1978, and the court was concerned with the following statutory language in the 1978 version of the statute: "This chapter shall govern all product liability actions, including those in which the theory of liability is negligence or strict liability in tort" *Id.* at 416 (quoting IND. CODE § 33-1-1.5-1 (1982)). Concluding that the action had survived passage of the Act, the court went on to address the merits of the case.

¹⁰⁶*Corbin*, 748 F.2d at 417.

¹⁰⁷IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985).

¹⁰⁸See Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV. 925, 942-54 (1984) (containing a discussion of various states' approach to no-duty rules under comparative fault systems). See also WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* 14:32 (1978).

purpose of comparative fault.¹⁰⁹ The logic of the open and obvious danger rule is questionable under negligence systems because it swallows the assumption of risk defense and greatly expands the concept of contributory negligence, both of which are viable defenses in a negligence action.¹¹⁰ The *Bridgewater* and *Corbin* courts' approach creates a question of whether the no-duty rule should continue under a comparative fault system where the application of the rule actually prevents the comparison of fault. It would seem that the approach utilized by the Minnesota Supreme Court in *Holm v. Sponco Manufacturing, Inc.*¹¹¹ would be desirable. In that case, the court abandoned the use of the rule as a complete bar to recovery and treated it as a factor to be considered in determining whether a product was unreasonably dangerous and whether the injured person had exercised reasonable care.¹¹²

The impact of the *Bridgewater* and *Corbin* courts' interpretation of the *Bemis* decision has the potential for significant impact because it supports the application of the open and obvious danger rule to product cases based on a negligence theory.¹¹³ The level of this impact will perhaps never be known because of the new issues added to the debate by the adoption of comparative fault.

The *Bemis* decision was also based on a strict liability claim.¹¹⁴ The importance of this was pointed out by the court of appeals in *Bridgewater*¹¹⁵ and may have been a major factor in the *Corbin* court's decision to apply the open and obvious danger rule to the case. The *Bridgewater* and *Corbin* courts' application of the rule appears to have been based on the fact that the cases involved products and the *Bemis* decision was intended, like the product liability statute,¹¹⁶ to apply to all actions whether based on negligence or strict liability. However, the products statute has since been revised and now applies only to actions based on a claim of strict liability.¹¹⁷ Presumably, the open and obvious danger rule, as applied in *Bemis*, should not have a place in negligence actions because the plaintiff's conduct is already considered in both the contributory negligence and assumption of risk defenses. The adequacy of these defenses in negligence actions was acknowledged by the majority of the supreme court in *Bridgewater*.¹¹⁸ Justice Shepard disagreed with the application of the open and obvious rule to product liability actions based on negligence and

¹⁰⁹See Pardieck, *supra* note 108, at 942-54.

¹¹⁰*Id.*

¹¹¹324 N.W.2d 207 (Minn. 1982).

¹¹²*Id.* at 213.

¹¹³*Corbin*, 748 F.2d at 417.

¹¹⁴427 N.E.2d at 1061.

¹¹⁵464 N.E.2d at 18. See *supra* text accompanying notes 72-80.

¹¹⁶IND. CODE § 33-1-1.5-1 (1983).

¹¹⁷IND. CODE §§ 33-1-1.5-1 to -6 (Supp. 1985).

¹¹⁸486 N.E.2d at 489.

noted that no examination had been made as to the reasons for applying the rule in some negligence actions but not in others.¹¹⁹ Presumably, the Indiana Supreme Court will be asked to address this issue again and examine the logic of the distinction being made between product and non-product negligence actions. If this is done, the court may find that the open and obvious danger rule should not apply in any type of negligence action because adequate defenses already exist in these actions.¹²⁰ This would leave Indiana with a situation in which the open and obvious danger rule could totally bar recovery in a strict products liability theory, but act as only a factor to be considered in a products claim based on negligence. A more logical approach, and one more consistent with the goals of comparative fault, would be to utilize the open and obvious danger as a factor to be considered in determining whether the plaintiff had incurred the risk of injury in a strict products liability action and as a factor in determining fault in a negligence based action. This approach has been utilized successfully by other jurisdictions¹²¹ and avoids the problem of treating products cases differently because of the theory pursued. It also avoids adopting an approach that is inconsistent with the comparative fault act.

Because strict liability claims are not covered by comparative fault,¹²² it is possible that the open and obvious danger rule could continue to exist in its unaltered form in strict products cases.¹²³ At this time, it is impossible to predict which route will be chosen by the Indiana courts. Adopting the approach of treating the open and obvious danger issue as a factor to be considered would, however, avoid serious problems in the future and would be consistent with the *Corbin* decision and avoid distinctions in the treatment of personal injury cases based on the method of injury or theory pursued.

¹¹⁹*Id.* at 490-91 (Shepard, J., concurring in part, dissenting in part).

¹²⁰If the adequacy of available defenses is considered, it is highly questionable whether the open and obvious danger rule should apply as a complete defense in any type of action. Under Indiana's Product Liability Statute, manufacturers may assert four major defenses: 1) incurred or assumed risk; 2) misuse of the product; 3) modification or alteration of the product; and 4) state of the art. IND. CODE § 33-1-1.5-4(b) (Supp. 1985). The assumed risk defense is similar to the open and obvious danger rule and adequately protects manufacturers, especially because contributory negligence is not a defense in strict product liability actions. The obviousness of a danger should logically only be a factor that is considered in determining whether the product user incurred the risk of using the product.

¹²¹See *supra* note 2.

¹²²IND. CODE § 34-4-33-1 (Supp. 1985).

¹²³The authors' personal view is that the obviousness of a danger should be treated as only one factor for the jury to consider when determining whether a product is unreasonably dangerous and whether the plaintiff has exercised reasonable care.

*B. Factors Considered in Determining Whether a Danger
is Truly Open and Obvious*

The *Corbin* decision presents unlimited possibilities for determining whether a danger is really open and obvious.¹²⁴ The test applied is still the objective test enunciated and followed in Indiana decisions. The factors considered, however, are greatly advanced.¹²⁵ The *Corbin* decision entered a consideration of not only physical factors but psychological factors.¹²⁶ The court recognized that perceiving danger or hazards is not as simple as one first believes. The issue is not as simple as the water is four feet deep and everyone knows diving into water of that depth can be dangerous. Rather, the issue encompasses a determination of what people generally believe about diving. The court acknowledged, as did the *Hoffman* court,¹²⁷ that people can know of a general danger but not be aware of a more specific danger.¹²⁸

The *Corbin* decision is a culmination of the course begun by the Indiana open and obvious danger cases. It indicates that the no-duty rule operates to bar recovery only where the specific danger is known, appreciated, and clearly visible.¹²⁹ This case, it is hoped, will alert Indiana courts to the complexity of hazard and risk recognition.¹³⁰ The case is also instructive in showing that questions of fact will at times be presented in determining what a populace does generally believe. When such questions are presented, the resolution of the issue should be left for the jury, even under the no-duty rule approach.

The close examination of the facts presented and the consideration of psychological factors may serve as a step to bring Indiana more in line with other jurisdictions. While Indiana may still have the open and obvious danger rule, its harsh effects can be lessened by a consideration of all the factors and an understanding of the complexity of the issues

¹²⁴The decision also is cause for hope that the rule will one day be altered and treated as only a factor to be considered rather than a complete bar to recovery. If such a change does not occur, the *Corbin* decision at least provides an avenue for construing the rule narrowly.

¹²⁵*Corbin*, 748 F.2d at 417-21.

¹²⁶*Id.* at 417-18.

¹²⁷See *supra* notes 27-40 and accompanying text.

¹²⁸*Corbin*, 748 F.2d at 420.

¹²⁹*Id.*

¹³⁰Several articles discussing the human's ability to recognize and perceive hazards have been written. These articles indicate that humans, as a whole, have great difficulty in perceiving and understanding risks for various reasons, the major reason being that people are poor judges of probability and therefore underestimate the probability that an accident or injury could occur. See, e.g., McKean, *Decisions, Discover*, June 1985, p. 22; Kahneman and Tversky, *The Psychology of Preferences*, 246 SCIENTIFIC AMERICAN 160 (1982). See also WICKENS, *ENGINEERING PSYCHOLOGY AND HUMAN PERFORMANCE* (1984).

of risk and danger recognition. The focus on what people in the plaintiff's position at the time of the accident would have believed is also beneficial. It places the determination of what constitutes an open and obvious danger in the proper perspective by focusing on what the average person with the plaintiff's level of knowledge and understanding would see and believe, not what a manufacturer with years of experience believes should be open and obvious.¹³¹

VII. CONCLUSION

The *Corbin* decision promises to have an impact on Indiana's open and obvious danger rule in two major areas. First, it supports the application of the rule to products cases based on a negligence claim. The decision's impact in this area may be overshadowed by the adoption of comparative fault and the issues comparative fault raises with regard to no-duty rules. Second, the *Corbin* case places the open and obvious danger rule in a more human light. Its consideration of psychological as well as physical factors shows an appreciation for the complexity of the human's ability to recognize and perceive danger. Consideration of these factors will lessen the harsh effect of the open and obvious danger rule by recognizing that sometimes the obviousness is elusive.

¹³¹It is noteworthy that manufacturers themselves have recognized the great importance proper design and warnings play in the production process. It is axiomatic that good design calls for dangers to be designed out if possible, guarded against, and warned about, in that order. See HAMMER, *PRODUCT SAFETY MANAGEMENT AND ENGINEERING* 55, 108-13 (1980). The importance of warnings is to alert the product user of hazards or other noteworthy conditions, and they are necessary to prevent users from making incorrect decisions that could cause accidents. See HAMMER, *HANDBOOK OF SYSTEM AND PRODUCT SAFETY* 86 (1972).

1985 Amendments to the Indiana Medical Malpractice Act

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I. INTRODUCTION

The 1985 amendments to the Indiana Medical Malpractice Act¹ (the "Act") represent the most comprehensive set of amendments since the Act was passed in 1975. The amendments were enacted as four separate bills² and are in large part the product of the hearings and deliberations of the Interim Committee on Medical Malpractice.³

The purpose of this Article is to identify the changes that have been made in the Act and to comment, where appropriate, on possible effects of these changes. Editorial comments have been confined to the concluding section of this Article. The changes in each chapter are, for the most part, discussed in the same sequence as each chapter appears in the Act.⁴ Changes reflecting merely "language clean-up" are not addressed in this Article.

II. CHAPTER 1 - DEFINITIONS AND GENERAL APPLICATIONS

Indiana Code section 16-9.5-1-1, the general definition section of

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¹IND. CODE §§ 16-9.5-1-1 to 10-5-5 (Supp. 1985).

²H. 1298 was enacted as Pub. L. No. 177 (1985); H. 1944 was enacted as Pub. L. No. 178 (1985); S. 443 was enacted as Pub. L. No. 179 (1985); H. 1929 was enacted as Pub. L. No. 180 (1985).

³The Interim Study Committee on Medical Malpractice consisted of six Indiana State Senators, six Indiana State Representatives, and two lay members (both of whom are doctors). The Committee met five times throughout the summer and fall of 1984, and heard testimony from twenty-two witnesses. All the proposals which had unanimous Committee support were incorporated into one bill (the "consensus bill"). The other proposals which had majority support were incorporated into three other bills. The Committee's "Legislative Council Directive" was

to study problems related to medical malpractice. In particular, the committee shall examine the financial status of the patient's compensation fund as of June 30, 1984, recommend procedures for handling claims of less than \$25,000, review recent medical malpractice court decisions, explore ways to address catastrophic losses, and make recommendations concerning structured settlements.

Legislative Council Directive, Interim Study Committee on Medical Malpractice (available in *Indiana Law Review Office*).

⁴Chapters five, seven, eight, and ten were not amended.

the Act, underwent several changes as a result of two separate bills.⁵ In the list of "health care providers," "a person" was changed to "an individual."⁶ "Community mental health clinic" was deleted from the list and "community health center" and "migrant health center" were added.⁷ "Physician" was changed from "a person" to "an individual,"⁸ and definitions of "community health center" and "migrant health center" were added.⁹ Also added as a new additional definition of "health care provider" is "a health care organization whose members, shareholders, or partners are health care providers under subdivision (1)."¹⁰ Finally, the definition of "community mental retardation center" was expanded to include those centers dealing with "other developmental disabilities."¹¹

Indiana Code section 16-9.5-1-6, which previously prohibited the inclusion of a dollar amount in the prayer for damages in a complaint controlled by the Act, was amended to reflect a new scheme providing an alternative procedure for "small claims" in an amount no greater than fifteen thousand dollars.¹² Indiana Code section 16-9.5-1-6 now excludes these "small claims" from the prohibition of specific dollar amount prayers for damages.¹³

Indiana Code section 16-9.5-1-8¹⁴ was added to exempt certain expenditures by the Insurance Commissioner from state procurement re-

⁵Pub. L. No. 177 (1985) and Pub. L. No. 28 (1985).

⁶IND. CODE § 16-9.5-1-1(a)(1) (Supp. 1985).

⁷IND. CODE § 16-9.5-1-1(a)(3) (Supp. 1985).

⁸IND. CODE § 16-9.5-1-1(b) (Supp. 1985).

⁹IND. CODE § 16-9.5-1-1(q)-(r) (Supp. 1985). Definitions previously designated as (r) and (s) were redesignated (s) and (t). "'Community health center' means a provider of primary health care organized as a not-for-profit corporation under IC § 23-7-1.1 and governed by a board of directors, at least fifty-one percent (51%) of whom are representatives of consumers." IND. CODE § 16-9.5-1-1(9) (Supp. 1985). "'Migrant health center' means a provider of primary health care organized as a not-for-profit corporation under IC § 23-7-1.1 and governed by a board of directors, at least fifty-one percent (51%) of whom are representatives of consumers and funded under Section 329 of the U.S. Public Health Service Act." IND. CODE § 16-9.5-1-1(r) (Supp. 1985).

¹⁰IND. CODE § 16-9.5-1-1(a)(6) (Supp. 1985). IND. CODE § 16-9.5-1-1(a)(1) lists as health care providers:

[a]n individual, partnership, corporation, professional corporation, facility, or institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or as an officer, employee, or agent thereof acting in the course and scope of his employment.

¹¹IND. CODE § 16-9.5-1-1(p) (Supp. 1985).

¹²IND. CODE § 16-9.5-9-2.1(a) (Supp. 1985).

¹³The new "small claims" provision of the Act is discussed in more detail below. See *infra* notes 65-70 and accompanying text.

¹⁴IND. CODE § 16-9.5-1-8 (Supp. 1985). The designation of this new section as 16-9.5-1-8 poses a problem in that IND. CODE § 16-9.5-1-8 (1982) is currently in force as a

quirements.¹⁵ This new section exempts expenditures for technical contractual personnel and services retained for protecting and administering the Patients Compensation Fund¹⁶ ("Fund") and expenditures for purchasing financing vehicles for structuring settlements.

III. CHAPTER 2 - LIMITATIONS OF RECOVERY

Indiana Code section 16-9.5-2 was greatly expanded as a result of passage of the so-called "Vobach bill."¹⁷ The existing provisions¹⁸ of this chapter were left unchanged. Four new sections¹⁹ were added to: (1) clarify the Insurance Commissioner's authority to enter into structured settlements; (2) define the respective roles of the Fund and the health care providers in combined structured settlements; and (3) define the effects of various elements of the settlement structure.

Indiana Code section 16-9.5-2-2.1 refers to a structured settlement as a "periodic payments agreement," and defines such an agreement as:

[a] contract between a health care provider (or its insurer) and the patient (or the patient's estate), whereby the health care provider is relieved from possible liability in consideration of:

- (1) a present payment of money to the patient (or the patient's estate); and
- (2) one (1) or more payments to the patient (or the patient's estate) in the future;

whether or not some or all of the payments are contingent upon the patient's survival to the proposed date of payment.²⁰

This section further states that the "cost" of a periodic payments agreement under the Act is the amount paid, at the time the agreement is entered into, to obtain the commitment of a third party to make the payments.²¹ Indiana Code section 16-9.5-2-2.1(b) also provides that the

separate statutory provision and has not been repealed or redesignated by the 1984 Legislature which created the new subsection 8. New subsection 8 is distinct from the previous subsection 8. Apparently the Legislature intended to designate this new section as 16-9.5-1-8.1 or by some other such distinguishing characteristic. However, at present, the Indiana Code contains two official statutes designated as § 16-9.5-1-8. The Legislature should correct these confused designations at its earliest opportunity.

¹⁵Expenditures exempted would otherwise be covered by Article 13.4 of title 4 of the Indiana Code.

¹⁶IND. CODE § 16-9.5-4-1 (1982). See *infra* notes 45-57 and accompanying text.

¹⁷Senator William Vobach was the major proponent of structured settlement provisions in the Act.

¹⁸IND. CODE §§ 16-9.5-2-1 to -2 (1982).

¹⁹IND. CODE §§ 16-9.5-2-2.1 to -2.4 (Supp. 1985).

²⁰IND. CODE § 16-9.5-2-2.1(a) (Supp. 1985).

²¹IND. CODE § 16-9.5-2-2.1(b) (Supp. 1985).

total of the future payments may exceed the health care provider's (or its insurer's)²² liability limit of \$100,000 and the Fund's liability limit of \$400,000.²³

Two points are of special note regarding this new section. First, there must be a present payment of money to the patient or the patient's estate,²⁴ although no specific amount or percentage is mandated. Practical considerations would seem to dictate that this present payment would usually be at least enough to cover the patient's legal fees and expenses of litigation. Second, subsection (b) of Indiana Code section 16-9.5-2-2.1, in defining "the cost of the periodic payments agreement," refers specifically to the amount paid by the health care provider, by the Fund, or by the Fund and the health care provider jointly, *to a third party* who, in turn, commits to make the future payments to the patient (or the patient's estate).²⁵ Although this third party ultimate payor is not referred to in subsection (a) of Indiana Code section 16-9.5-2-2.1, which defines "periodic payments agreement," both subsections read together indicate that the future payments cannot be paid from the funds of the health care provider or the Fund, but must instead be derived from the funds of a third party whose commitment to make the future payments is purchased by the health care provider or the Fund.²⁶

Indiana Code section 16-9.5-2-2.2 details several requirements relating to periodic payments by the health care provider. New subsection 2.2 first states that the previously established limits²⁷ on recovery from a health care provider apply without change where possible liability of the health care provider is discharged entirely through an immediate pay-

²²Throughout this Article, references to payments by the health care provider also include the health care provider's insurer.

²³IND. CODE § 16-9.5-2-2.1(b) (Supp. 1985). (IND. CODE § 16-9.5-2-2 states that the "total amount recoverable for an injury or death of a patient may not exceed five hundred thousand dollars (\$500,000)," however, the future payments may now exceed this limited liability amount.)

²⁴IND. CODE § 16-9.5-2-2.1(a)(1) (Supp. 1985).

²⁵Throughout this Article, references to payments made to, or claims made by, the patient also include those of the patient's estate.

²⁶Although this "third party payor" requirement provision is limited in its applicability, by its own language, to Chapter 2, it does refer specifically to amounts expended by the Commissioner (which means out of the Fund). As a result, it seems to raise a conflict with the provisions of new IND. CODE § 16-9.5-4-4 (Supp. 1985). An alternative reading of this section would allow future payments directly from the funds of the health care provider (or its insurer) or the Fund, but disallow the inclusion of these amounts in the calculation of the "cost" of the periodic payments agreement. This alternative reading makes little sense, given the significance of the "costs" concept in other determinations within the Act.

²⁷This amount is one hundred thousand dollars (\$100,000), as set forth in IND. CODE § 16-9.5-2-2(b) and (d) (1982).

ment.²⁸ Subsection (b) of Indiana Code section 16-9.5-2-2.2 provides that for the dual purposes of determining the health care provider's maximum liability²⁹ and whether the health care provider has agreed to settle its liability by payment of policy limits,³⁰ the sum of the present payment plus the cost of the periodic payments agreement must exceed \$75,000.³¹ If this sum does exceed \$75,000, the patient will have met the dollar amount requirement necessary to proceed against the Fund. This new subsection provides statutory guidelines for a settlement approach previously approved by the Commissioner. Clearly, the health care providers, or more specifically their insurers, benefit from this provision. If they can convince the patient to accept a periodic payments agreement, they can settle large claims and give the patient access to the Fund for an amount significantly discounted from their otherwise statutorily mandated maximum liability of \$100,000. On one hand, the patient benefits from the change by gaining easier access to the Fund because of the lower threshold of out-of-pocket expenditure by the health care provider. To gain this benefit, however, the patient must accept a periodic payments agreement from the health care provider. The clear loser in this change in the Act is the Patient's Compensation Fund. The health care provider's threshold cost for allowing patient access to the Fund is substantially decreased. Therefore, if patients prove willing to accept periodic payments agreements with the health care provider, the patients will have easier access to the Fund, and more settlements providing access to the Fund can be anticipated.

Indiana Code section 16-9.5-2-2.2 also provides that the \$75,000 threshold for patient access to the Fund under a periodic payments agreement can be satisfied by the sum of the amounts contributed by more than one health care provider, as long as one health care provider contributes at least \$50,000 to the immediate payment and the cost of the periodic payments.³² Prior to this amendment, the Insurance Commissioner required that the patient obtain the full \$100,000 from a single health care provider before the patient could gain access to the Fund. Obtaining a total of \$100,000 from contributions from two or more health care providers was previously not sufficient to gain access to the Fund. Under Indiana Code section 16-9.5-2-2.2(c), patients can now

²⁸IND. CODE § 16-9.5-2-2.2(a) (Supp. 1985).

²⁹This amount is one hundred thousand dollars (\$100,000), as set forth in IND. CODE § 16-9.5-2-2(b) and (d) (1982).

³⁰An agreement by the health care provider to settle its liability by payment of its policy limits of one hundred thousand dollars (\$100,000) is a requirement of IND. CODE § 16-9.5-4-3 (1982), which must be met before the patient (or the patient's estate) can proceed against the Fund after settlement of a claim.

³¹IND. CODE § 16-9.5-2-2.2(b) (Supp. 1985).

³²IND. CODE § 16-9.5-2-2.2(c) (Supp. 1985).

combine health care provider contributions and reach the Fund if these contributions total in excess of \$75,000. Again, the price the patient must pay for this easier access to the Fund is the acceptance of a periodic payments agreement.

Indiana Code section 16-9.5-2-2.3 controls periodic payments from the Fund in a manner similar to the way Indiana Code section 16-9.5-2-2.2 controls periodic payments from health care providers. If the possible liability of the Fund is discharged completely through an immediate payment, the previously established limit on recovery from the Fund³³ applies without change.³⁴ If the Fund's possible liability is discharged through a periodic payments agreement, the patient's recovery is calculated as the sum of the immediate payment from the Fund plus the cost of the periodic payments agreement paid out of the Fund.³⁵ This amount will be used to determine the maximum recovery allowable from the Fund. Negotiators representing the Fund can be expected to push for periodic payments agreements in an effort to reduce the amounts of cash disbursements from the Fund. Patients can be expected to resist these efforts unless they can obtain agreements offering financial benefits in significant excess of what the patients can obtain through their own management of a lump sum immediate payment.

Section 2.4 authorizes the discharge of the Fund's possible liability through periodic payments agreements, notwithstanding the Act's general requirement that all claims against the Fund that become final be paid in full during one of two periods each year.³⁶ Subsection (2) of this new Code provision allows the Insurance Commissioner to combine money from the Fund with the money from the health care provider to pay the cost of the periodic payments agreement, as long as the money from the Fund does not exceed eighty percent of the total amount paid for the agreement.³⁷

Indiana Code section 16-9.5-2-6 alters the financial responsibility of hospitals and creates a financial responsibility requirement for prepaid health care delivery plans. For hospitals of one hundred or fewer beds, the previous \$2,000,000 annual aggregate limit³⁸ was changed to a min-

³³The provisions of IND. CODE § 16-9.5-2-2 (1982) establish a maximum recovery from the Fund of four hundred thousand dollars (\$400,000). (The maximum recoverable amount is \$500,000, and the maximum recoverable amount against the health care provider is limited to \$100,000, thus the Fund's liability is limited to \$400,000.).

³⁴IND. CODE § 16-9.5-2-2.3(a) (Supp. 1985).

³⁵IND. CODE § 16-9.5-2-2.3(b) (Supp. 1985).

³⁶IND. CODE § 16-9.5-2-2.4 (Supp. 1985). IND. CODE § 16-9.5-4-1(j) (Supp. 1985) and § 16-9.5-4-2 (Supp. 1985) contain specific payment rules which apply to lump sum immediate payments. For a more specific discussion, see *infra* text accompanying notes 45-57.

³⁷IND. CODE § 16-9.5-2-2.4(2) (Supp. 1985).

³⁸IND. CODE § 16-9.5-2-6(a)(1) (1984), amended by IND. CODE § 16-9.5-2-6 (Supp. 1985).

imum annual aggregate insurance amount.³⁹ The same change was made for the \$3,000,000 requirement for hospitals of more than one hundred beds.⁴⁰ For prepaid health care delivery plans,⁴¹ the minimum annual aggregate insurance amount is set at \$700,000.⁴²

IV. CHAPTER 3 - STATUTE OF LIMITATIONS

Indiana Code section 16-9.5-3-1, the general statute of limitations section, was amended by the addition of a subsection⁴³ which clarifies the statute of limitations applicable to patients who first file an action under the new "small claims" provisions,⁴⁴ but then during the pendency of the action discover their claim is worth more than \$15,000 and dismiss the action for the purpose of commencing the action through the medical review panel process. The statute of limitations under these circumstances will be discussed below in the explanation of the new "small claims" provision.⁴⁵

The members of the Interim Committee on Medical Malpractice considered a proposal by some of the members to change the medical malpractice statute of limitations from an "occurrence" statute to a "discovery" statute.⁴⁶ Although several members of the Committee expressed philosophical and equitable preferences for a "discovery" statute, concerns expressed about difficulties in predicting future claims expense led to a Committee vote not to draft a proposed change.⁴⁷

V. CHAPTER 4 - PATIENT'S COMPENSATION FUND

Chapter Four of the Act underwent several changes relating to the administration and solvency of the Fund. The limitation that the surcharge

³⁹IND. CODE § 16-9.5-2-6(1)(A)(i) (Supp. 1985).

⁴⁰IND. CODE § 16-9.5-2-6(1)(A)(ii) (Supp. 1985).

⁴¹See IND. CODE § 27-8-7-1(h) (1982) which defines a "prepaid health care delivery plan" as:

an undertaking to provide, directly or through arrangements with providers, health care services to individuals voluntarily enrolled with such an organization on a per capita or a predetermined, fixed prepayment basis and includes a health maintenance organization plan. A prepaid health care delivery plan does not include payments made in advance of service to a provider for health services relating to a single operation or procedure, such as services provided before, during, or following a surgical procedure or the delivery of a child.

⁴²IND. CODE § 16-9.5-2-6(1)(B) (Supp. 1985).

⁴³IND. CODE § 16-9.5-3-1(b) (Supp. 1985).

⁴⁴IND. CODE § 16-9.5-9-2.1 (Supp. 1985).

⁴⁵See *infra* note 59 and accompanying text.

⁴⁶Minutes of the Interim Committee on Medical Malpractice 5 (Sept. 14, 1985) (available in *Indiana Law Review Office*). A "discovery" statute is one whereby the statute of limitations does not begin to run until the alleged act, omission, or neglect is discovered by the claimant.

⁴⁷Minutes of the Interim Committee on Medical Malpractice 5 (Sept. 14, 1985) (available in *Indiana Law Review Office*).

levied against the health care providers not exceed fifty percent of the health care provider's insurance premium was deleted from Indiana Code section 16-9.5-4-1(b). As a substitute, Indiana Code section 16-9.5-4-1.1 was added and raised the maximum surcharge to seventy-five percent of the health care provider's insurance premium. In addition, this new section granted authority to the Insurance Commissioner to institute further increases in the surcharge, up to a maximum surcharge equal to one hundred percent of the health care provider's insurance premium, at any time after January 1, 1986, when the balance in the Fund is less than \$15,000,000.⁴⁸ Because of a perceived fiscal emergency relating to the solvency of the Fund, authority for a surcharge increase up to the seventy-five percent maximum took effect immediately upon passage.⁴⁹

Prior to the 1985 amendments to the Act, a health care provider could obtain retroactive protection of the Act for a period of up to 180 days prior to the date on which he actually met his proof of financial responsibility⁵⁰ and surcharge payment requirements.⁵¹ Under this provision, as long as the proof of financial responsibility was filed not later than 180 days after the effective date of the policy, compliance requirements for protection under the Act were considered to have been met on the effective date of the policy.⁵² After 180 days, compliance was deemed to have occurred on the date compliance actually occurred.⁵³ The 1985 amendments to the Act reduce this time period to ninety days.⁵⁴

Indiana Code section 16-9.5-4-1(h) was amended to grant authority to the Insurance Commissioner to use money from the Fund to purchase services to aid in defending the Fund against claims.⁵⁵ Subsection (j) was amended to provide for payments from the Fund twice a year instead of once a year.⁵⁶ Under this amendment, claims against the Fund which become final between January 1 and June 30 of each year must be computed on June 30 and paid by the following July 15. Claims which have become final between July 1 and December 31 must be computed on December 31 and paid by the following January 15. If the balance in the Fund is insufficient to pay all claims due in full, all payments are prorated among the remaining unpaid claimants.⁵⁷ All unpaid amounts

⁴⁸Ind. Code § 16-9.5-4-1.1 (Supp. 1985).

⁴⁹Pub. L. No. 178, § 7 (1985). IND. CODE § 16-9.5-4-1(e) (1982), *amended by* IND. CODE § 16-9.5-4-1 (Supp. 1985).

⁵⁰This requirement is generally met by the purchase of a medical malpractice insurance policy. See IND. CODE § 16-9.5-2-1 for the specific requirements.

⁵¹See IND. CODE § 16-9.5-2-1 (1982) for the requirements.

⁵²IND. CODE § 16-9.5-4-1(e) (1982), *amended by* IND. CODE § 16-9.5-4-1 (Supp. 1985).

⁵³*Id.*

⁵⁴IND. CODE § 16-9.5-4-1(e) (Supp. 1985).

⁵⁵IND. CODE § 16-9.5-4-1(h) (Supp. 1985).

⁵⁶IND. CODE § 16-9.5-4-1(j) (Supp. 1985).

⁵⁷*Id.*

from one pay period are carried over to the next pay period and are paid before any new final claims are paid.⁵⁸ Indiana Code section 16-9.5-4-2 was amended to direct the issuance of warrants by the Indiana State Auditor in the amount of each claim made final by the two computation dates established in Indiana Code 16-9.5-4-1(j).

Indiana Code section 16-9.5-4-4 was added to authorize the Fund to discharge its liability to a patient in one of four ways. The Fund may: (1) make an immediate lump sum payment of the total amount due; (2) enter into an agreement requiring periodic payments from the Fund; (3) purchase an annuity payable to the patient; or (4) any combination of the above.⁵⁹ This new section also gives the Insurance Commissioner the authority to contract with approved insurance companies to insure the Fund's ability to meet any periodic payment obligations it assumes. The Insurance Commissioner, unlike the health care provider, thus appears to be able to enter into periodic payments agreements without the obligation to purchase an annuity from a third party. The apparent conflict between this section and Indiana Code section 16-9.5-2-2.1 is unaddressed in the 1985 Amendments.⁶⁰

VI. CHAPTER 6 - REPORTING AND REVIEW OF CLAIMS

Indiana Code section 16-9.5-6-1 was amended to add a reserve notification requirement to the pre-existing requirement that the plaintiff's attorney notify the Insurance Commissioner of all claim settlements or judgments within sixty (60) days following final disposition of the claim.⁶¹ Under the new reporting requirement, the health care provider's insurer must immediately notify the Insurance Commissioner whenever the insurer establishes a claim reserve of \$50,000 or more on any malpractice case.⁶² The "notice" and contents of these reports are confidential.⁶³

VII. CHAPTER 9 - MEDICAL REVIEW PANEL

Perhaps the most significant legislative changes in the Act are those relating to the medical review panel. Several changes affect panel composition and procedures. Two separate sections provide, for the first time, procedural mechanisms for bypassing panel review in claims against qualified health care providers.

A new subsection has been added to Indiana Code section 16-9.5-9-2, which previously required that any claim against qualified health

⁵⁸*Id.*

⁵⁹IND. CODE § 16-9.5-4-4 (Supp. 1985).

⁶⁰*See supra* note 21 and accompanying text.

⁶¹IND. CODE § 16-9.5-6-1(b) (Supp. 1985).

⁶²IND. CODE § 16-9.5-6-1(a) (Supp. 1985).

⁶³*Id.*

care provides be presented to a medical review panel, and that an opinion be rendered by that panel before the claim could be filed in any court. The new subsection further provides that

(b) [a] claimant may commence an action in court for malpractice without the presentation of the claim to a medical review panel if the claimant and all parties named as defendants in the action agree that the claim is not to be presented to a medical review panel. The agreement must be in writing and must be signed by each party or an authorized agent of the party. The claimant must attach a copy of the agreement to the complaint filed with the court in which the action is commenced.⁶⁴

A second avenue allowing commencement of court action against a health care provider without obtaining prior panel review has been created by new section 2.1, which allows for direct court filing against a qualified health care provider without prior panel review if the patient seeks damages of no more than \$15,000 and so states in the complaint. A patient who files directly in a court under this provision is barred from recovering any more than \$15,000 unless the patient

(1) commences an action under subsection (a) in the reasonable belief that damages in an amount equal to or less than fifteen thousand dollars (\$15,000) are adequate compensation for the bodily injury allegedly caused by the health care provider's malpractice; and

(2) later learns, during pendency of the action, that the bodily injury is more serious than previously believed and that the fifteen thousand dollars (\$15,000) is insufficient compensation for the bodily injury⁶⁵

The use of the term "bodily injury" in this escape clause creates a significant ambiguity. Does subsection (b)(1) mean that the threshold damages amount in the escape clause or, perhaps, even the entire section, refers only to "bodily injury," as distinguished from economic injury such as lost wages, or does it refer more generally to all recognized consequences of a bodily injury? Does subsection (b)(2) mean that the consequences of bodily injury itself must be more serious than previously believed, or that the consequences of bodily injury, of whatever nature, must be more serious than previously believed?⁶⁶

⁶⁴IND. CODE § 16-9.5-9-2(b) (Supp. 1985). The author's discussions of this provision with numerous attorneys familiar with medical malpractice litigation have revealed the nearly universally held opinion that it is highly unlikely that an Indiana health care provider (or its insurer) would ever agree to waive the medical panel review.

⁶⁵IND. CODE § 16-9.5-9-2.1(b) (Supp. 1985).

⁶⁶The minutes of the hearings before the Interim Committee on Medical Malpractice

If a patient files a "small claims" action under Indiana Code section 16-9.5-9-2.1(a) and then wishes to "escape" under subsection (b), the patient may file a motion to dismiss without prejudice and, if granted, may file a proposed complaint under Indiana Code section 16-9.5-9-1 and proceed through the panel review process.⁶⁷ After the panel opinion is rendered, the patient may proceed with an action in court without being subject to the \$15,000 limitation.⁶⁸ If a patient moves for a dismissal without prejudice, obtains it, and later wishes to refile under subsection (a) of this "small claims" section, the patient may do so only if the motion for dismissal was filed within two years after the original filing under subsection (a).⁶⁹ For a patient who files in court under this "small claims" provision, then "escapes" under subsection (b), proceeds through medical review panel review, and eventually refiles his action in court, the statute of limitations determining timeliness of the second court filing is two years and 180 days from the date of the alleged act, omission, or neglect.⁷⁰

Indiana Code section 16-9.5-9-3(b)(1), which partially controls the selection of the health care provider panel members, has also been significantly revised. Previously, if there was only one party defendant, *other than a hospital*, two of the three panel members had to be of the same class of health care provider as the defendant.⁷¹ In apparent recognition of the fact that the Act covers types of non-individual health care providers other than hospitals, the legislature deleted the "other than a hospital" language and provided that where there is only one party defendant "*who is an individual*," then two of the panelists must be of the same class of health care provider as the defendant.⁷² However, aware of ambiguities in the concept of "class" of health care provider, the legislature virtually rewrote the part of this provision setting forth the classification requirements of panel members.⁷³ Unfortunately, the legislature may have substituted one ambiguity for another. This provision now reads:

contain no indication that this provision was intended to embody the narrower interpretation. However, the ambiguity remains as a potential procedural trap for the patient who files directly in court under IND. CODE § 16-9.5-9-2.1(a) and then attempts to exercise the escape clause of IND. CODE § 16-9.5-9-2.1(b).

⁶⁷IND. CODE § 16-9.5-9-2.1(b) (Supp. 1985).

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰IND. CODE § 16-9.5-9-2.1(c) (Supp. 1985) (citing IND. CODE § 16-9.5-3-1(b), the two-year limitations statute).

⁷¹IND. CODE § 16-9.5-9-3(b)(1) (1982), *amended by* IND. CODE § 16-9.5-9-3-3 (Supp. 1985).

⁷²IND. CODE § 16-9.5-9-3(b)(1) (Supp. 1985) (emphasis added).

⁷³*See* IND. CODE § 16-9.5-9-3(b)(1) (Supp. 1985). The earlier version of this statute stated only that "two [2] of the panelists selected shall be from *the same class of health care provider as the defendant*." IND. CODE § 16-9.5-9-3, *amended by* IND. CODE § 16-9.5-9-3 (Supp. 1985) (emphasis added).

If there is only one (1) party defendant who is an individual, two (2) of the panelists selected must be members of the profession identified in IC 16-9.5-1-1(a)(1) of which the defendant is a member, and if the individual defendant is a health care professional who specializes in a limited area, two (2) of the panelists selected must be health care professionals who specialize in the same area as the defendant.⁷⁴

Left unanswered is who or what determines whether a health care professional specializes in a limited area. Must the health care professional be board certified, board eligible, or merely concentrate his practice in a given area? Is the health care provider's "specialization" in a given area to be judged by an objective standard and, if so, by whom, or is holding oneself out to the public as a "specialist" sufficient? This new language therefore appears to hold the same potential for controversy as did the previous language.

Amended section four contains several additions that address panel procedural issues. The panel chairman must now "ensure" that each panel member has had the opportunity to review every item of evidence before the panel renders its opinion.⁷⁵ Each panel member must take an oath in writing before considering any evidence or deliberating with other panel members.⁷⁶ Neither a party, nor a party's agent, attorney or insurer, may communicate "except as authorized by law," with a panel member before the panel has rendered its opinion.⁷⁷

Indiana Code section 16-9.5-9-10, which controls compensation and fees of the panel members, was amended to change the compensation of health care provider panel members from twenty-five dollars per day to "up to \$250" for all work performed as a panel member, exclusive of witness fees if called to testify.⁷⁸ Compensation of the panel chairman was raised from \$100 per day to \$200 per day, not to exceed a total of \$1,000, increased from a previous total of \$500.⁷⁹

⁷⁴IND. CODE § 16-9.5-9-3(b)(1) (Supp. 1985).

⁷⁵IND. CODE § 16-9.5-9-4(a) (Supp. 1985). The prior version of the Code section contained no similar requirement.

⁷⁶IND. CODE § 16-9.5-9-4(b) (Supp. 1985). The precise language of the required oath is quoted in the subsection.

⁷⁷IND. CODE § 16-9.5-9-4(b) (Supp. 1985). This subsection does not specify what communication with panel members is "authorized by law," however, other Code sections seem to provide some guidance on this issue. IND. CODE § 16-9.5-9-4(a) (Supp. 1985) provides for submission of written evidence to the panel, including, "any . . . form of evidence allowable by the medical review panel." General panel practice has been to allow submission of a wide range of "evidence," including such items as briefs, letters, and settlement brochures. IND. CODE § 16-9.5-9-5 (1982) authorizes questioning of panel members by the parties at an informal hearing.

⁷⁸IND. CODE § 16-9.5-9-10(a) (Supp. 1985).

⁷⁹IND. CODE § 16-9.5-9-10(b) (Supp. 1985).

VIII. COMPARATIVE FAULT

Indiana Code section 34-4-33-1, which controls the applicability of the Indiana Comparative Fault Act,⁸⁰ was amended to provide that the Comparative Fault Act "does not apply to an action brought against a qualified health care provider under IC 16-9.5 for medical malpractice."⁸¹ Medical malpractice claims thus join the ever increasing list of claims exempted from the new Comparative Fault Act.⁸²

IX. EDITORIAL COMMENTS

The 1985 Amendments to the Indiana Medical Malpractice Act have solved some old problems, created some new ones, and ignored others. If there are prevailing themes to be found in the 1985 Amendments, they are found in efforts to bolster the sagging fiscal fortunes of the Patient's Compensation Fund and to avoid controversial issues. The amendments provide for an increase in both the surcharge levied against the health care providers and the rate at which further increases can occur. The effect is a potential doubling of the surcharge over the second half of 1985. Greater emphasis has been placed on encouraging structured settlements of both the health care provider's primary liability and the liability of the Fund. However, measures to encourage patients to accept structured settlements on the health care provider's liability may expose the Fund to easier and more frequent access by plaintiffs. Once again, the legislature has chosen to leave the maximum liability of both the health care provider and the Fund at the 1975 levels of \$100,000 and \$400,000, respectively, apparently feeling that structuring of settlements provides patients with a reasonable alternative to higher potential recovery. In addition, the legislature has provided the Insurance Commissioner with additional resources with which to defend the Fund.

Provisions addressing the adequacy of the current recovery limit, structured settlements notwithstanding, the problems with procedural delays, and the nature of the relationship between the primary carrier and the Fund are conspicuous by their absence. Even more important, neither the new amendments nor the minutes of the meetings of the Interim Study Committee on Medical Malpractice reflect an attempt to reevaluate either the policy assumptions that led to the passage of the Act in 1975 or the efficacy of the Act in dealing with the increasing problem of medical malpractice.

⁸⁰IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985).

⁸¹IND. CODE § 34-4-33-1(a) (Supp. 1985).

⁸²IND. CODE § 34-4-33-8 (Supp. 1985), provides that the Comparative Fault Act does not apply to tort claims against governmental entities or public employees. IND. CODE § 34-4-33-13 (Supp. 1985) provides that the Comparative Fault Act does not apply to strict liability actions under IND. CODE § 33-1-1.5 (the Indiana Product Liability Act) or to breach of warranty actions.

Dram Shop Liability in Indiana: Analysis of *Ashlock v. Norris* and the New Civil Statute

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I. INTRODUCTION

As a result of increasing public awareness and concern with the high incidence of alcohol-related automobile collisions and the horrendous injuries they often produce, there has been a substantial increase in dram shop litigation. Dram shop liability has been imposed nationwide on a variety of defendants. Taverns, restaurants, liquor stores, and commercial and social hosts, including employers, have been held liable for selling, serving, or otherwise providing alcoholic beverages to individuals who they knew or reasonably should have known were intoxicated.¹ Numerous states have adopted some form of dram shop liability. While some state legislatures have enacted dram shop statutes,² courts in other states have extended the common law to include dram shop liability.³

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¹See *Sutter v. Hutchings*, 327 S.E.2d 716 (Ga. 1985) and the twenty-two out-of-state decisions cited therein. See also *Graham, Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L.J. 561 (1980); Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445 (1983); Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983); Annot., 97 A.L.R.3d 528 (1980).

²See, e.g., ALA. CODE § 6-5-71 (1975); ALASKA STAT. § 04.21.020 (Supp. 1984); COLO. REV. STAT. § 13-21-103 (1974); CONN. GEN. STAT. ANN. § 30-102 (West 1975); FLA. STAT. ANN. § 768.125 (West Supp. 1985); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 123.92 (West Supp. 1985); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1985); N.Y. GEN. OBLIG. § 11-101 (McKinney 1978 & Supp. 1984-85); N.D. CENT. CODE § 5-01-06 (Supp. 1985); OHIO REV. CODE ANN. § 4399.01 (Page 1982); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32A-14-1 (Supp. 1985); VT. STAT. ANN. tit. 7, § 501 (1972).

Indiana recently adopted a civil dram shop liability statute. See *infra* notes 10-12 and accompanying text.

³See, e.g., *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) (applying District of Columbia law); *Dodd v. Slater*, 101 Ga. App. 362, 114 S.E.2d 170 (1960); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1967); *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); *Davis v. Billy's Con-Teena, Inc.*, 284 Or. 351, 587 P.2d 75 (1978); *Cullan v. O'Neil*, 20 Wash. App. 32, 578 P.2d 890 (1978).

Initially, this Article will discuss the development of dram shop liability in Indiana and will then focus on *Ashlock v. Norris*,⁴ a recent case which extended dram shop liability to a patron in a bar who had gratuitously furnished drinks to another patron. The Article will briefly discuss the new civil dram shop liability statute and will conclude with an analysis of dram shop liability under the Indiana Comparative Fault Act.

II. THE DEVELOPMENT OF DRAM SHOP LIABILITY IN INDIANA

In Indiana, there are two criminal statutes which, through judicial interpretation, have come to provide the basis for civil liability in dram shop cases.⁵ In addition, Indiana courts have held that there is a common law duty that applies in such cases.⁶ Indiana Code section 7.1-5-10-15, which prohibits furnishing alcohol to a person known to be intoxicated, provides in relevant part:

It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.⁷

Indiana Code section 7.1-5-7-8, which prohibits furnishing alcohol to a minor, provides that:

It is a Class C misdemeanor for a person to sell, barter, exchange, provide or furnish an alcoholic beverage to a minor.⁸

Indiana courts have consistently held that these criminal statutes establish a civil duty and thereby provide the basis for imposing civil liability for personal injuries and damages resulting from conduct in violation of these statutes.⁹

The 1986 Indiana legislature recently approved Senate Bill No. 85 which specifically deals with civil dram shop liability.¹⁰ This new statutory section provides in relevant part:

- (a) As used in this section, "furnish" includes barter, deliver, sell, exchange, provide, or give away.
- (b) A person who furnishes an alcoholic beverage to a

⁴475 N.E.2d 1167 (Ind. Ct. App. 1985).

⁵IND. CODE §§ 7.1-5-10-15 and 7.1-5-7-8 (Supp. 1985). See *infra* text accompanying notes 7-8 for the relevant text of these statutes.

⁶*Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966). See also *infra* text accompanying note 17.

⁷IND. CODE § 7.1-5-10-15 (Supp. 1985).

⁸IND. CODE § 7.1-5-7-8 (Supp. 1985).

⁹See *infra* notes 13-42 and accompanying text.

¹⁰Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

- (1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and
- (2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

This act will apply to actions accruing on and after April 1, 1986.¹² However, it does not appear that this new statutory section will have a major effect upon civil dram shop cases. In fact, the section may only codify the common law which had developed to this point.

Nearly twenty years ago, in *Elder v. Fisher*,¹³ the Supreme Court of Indiana held that the violation of the Indiana statute then in effect which prohibited the sale of intoxicating beverages to minors would constitute negligence per se in a personal injury action.¹⁴ In so holding, the court stated that the statute was designed to protect against more than the immediate and obvious effects of alcohol upon minors who consumed it.¹⁵ Because the legislature was concerned with the economic welfare, health, peace, and morals of minors, the court determined that it was probable that the legislature intended the statute to protect the citizens of Indiana from possible harm resulting from the use of intoxicating liquor by minors.¹⁶ In *Elder*, the court further held that, even in the absence of a specific statutory provision, "the general principles of common law negligence should be applied to cases involving intoxicating liquor."¹⁷

In *Brattain v. Herron*,¹⁸ an Indiana appellate court extended civil liability to a private individual who made alcoholic beverages available to a minor in her home.¹⁹ The evidence in this case revealed that the defendant had allowed a boy whom she knew to be a minor to consume alcoholic beverages in her home. The minor had obtained the liquor from the defendant's refrigerator himself. However, the defendant had

¹¹*Id.*

¹²*Id.*

¹³247 Ind. 598, 217 N.E.2d 847 (1966). In *Elder*, the plaintiff brought suit against a retail druggist who had sold alcoholic beverages to a seventeen year old boy. The boy consumed the alcohol and, after becoming intoxicated, was involved in an automobile collision in which the plaintiff was injured.

¹⁴*Id.* at 603, 217 N.E.2d at 851.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 607, 217 N.E.2d at 853.

¹⁸159 Ind. App. 663, 309 N.E.2d 150 (1974).

¹⁹*Id.* at 674, 309 N.E.2d at 156.

made no objections to the minor's consumption of the alcoholic beverages in her home nor to his taking beer with him when he left. The evidence further revealed that the defendant had known or, in the exercise of reasonable care, should have known, that the minor would be operating his automobile on the highway as soon as he left her home. Shortly after leaving the defendant's home, the minor was involved in a collision in which he caused injuries to the occupants of another vehicle.²⁰

The *Brattain* court cited *Elder* for the proposition that a violation of Indiana's statute prohibiting the sale of alcohol to minors constitutes negligence per se.²¹ The court expanded upon *Elder* in holding that the statute's application is not limited to vendors of liquor.²² The *Brattain* court went on to note that

any person who gives, provides, or furnishes alcoholic beverages to a minor is in violation of the statute. The rationale behind the *Elder* case is that our Legislature has sought to protect the citizens of Indiana from the dangers of minors who would consume alcoholic beverages. Our Supreme Court found that one who sells alcoholic beverages to a minor is liable in a civil action for negligence for injuries resulting from the violation of the statute [citation omitted]. We see no distinction between one who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor. The Legislature has provided that either of these actions is a violation of the statute.

Thus, it is our opinion that any person who violates the statute as it pertains to a minor can be liable in a civil action for negligence, since the violation of the statute as it pertains to a minor is negligence *per se*. The Legislature has not seen fit to distinguish between a seller and a social provider of alcoholic beverages to a minor and it is our opinion that no such distinction would be either logical or equitable.²³

In addition, the court in *Brattain* stated that even though the defendant had not served the liquor to the minor, she was still in violation of the statute because she allowed him to obtain the alcoholic beverages from her refrigerator without making any objection.²⁴

The Indiana appellate court further extended dram shop liability in *Parrett v. Lebamoff*.²⁵ The court held that the violation of Indiana Code section 7.1-5-10-15, which provides that it is unlawful to furnish alcohol *to another person known to be intoxicated*, also imposed a duty which

²⁰*Id.* at 665-66, 309 N.E.2d at 152.

²¹*Id.* at 674, 309 N.E.2d at 156.

²²*Id.*

²³*Id.* (emphasis in original).

²⁴*Id.* at 676, 309 N.E.2d at 157-58.

²⁵409 N.E.2d 1344 (Ind. Ct. App. 1980).

would serve as a basis for a civil action for damages.²⁶ In this case, the administratrix of the estate of a deceased driver brought a wrongful death action against the operators of a tavern, claiming that they served her deceased husband intoxicating beverages in violation of the statute and that, after leaving the tavern, her husband was killed in an automobile accident.²⁷ The court held that the intoxicated person himself is within the class of persons intended to be protected by the criminal statute.²⁸ However, the court also pointed out that contributory negligence may constitute a defense to an action based upon a violation of the statute, although not in situations involving willful, wanton, or reckless misconduct on the part of defendant-suppliers.²⁹

In *Elsperman v. Plump*,³⁰ the parents of a son who was killed in an automobile collision brought a wrongful death action against a bar and bartender for serving alcoholic beverages to a driver who subsequently caused the collision. The court in this case noted that "Indiana cases have clearly established the rule that a seller of alcoholic beverages may be held liable for injuries inflicted by an intoxicated person as a result of his intoxication, where such result was reasonably foreseeable and the sale of the intoxicant was in violation of law."³¹ In support of this rule, the court enumerated the following public policy considerations:

We concur with the Supreme Judicial Court of Massachusetts that "the waste of human life due to drunken driving on the highways will not be left outside the scope of the foreseeable risk created by the sale of liquor to an already intoxicated individual." . . . Like the Supreme Court of New Mexico we believe that "[i]n light of the use of automobiles and the increasing frequency of accidents involving drunk drivers, . . . the consequences of serving liquor to an intoxicated person whom the server knows or could have known is driving a car, is reasonably foreseeable."³²

Because it was undisputed that a negligence action could be predicated on the violation of the criminal statute forbidding the furnishing of alcohol to a person known to be intoxicated, and because the *Elsperman* court found that the bartender knew the motorist was driving an automobile,³³ the only issue on appeal was whether there was sufficient evidence to

²⁶*Id.* at 1345.

²⁷*Id.*

²⁸*Id.* at 1346.

²⁹*Id.* However, with the passage of Indiana's Comparative Fault Act, contributory negligence will no longer be an absolute bar to a plaintiff's recovery. IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985). See also *infra* text accompanying notes 114-16.

³⁰446 N.E.2d 1027 (Ind. Ct. App. 1983).

³¹*Id.* at 1030 (citation omitted).

³²*Id.* (citations omitted).

³³*Id.* at 1029.

support the conclusion that the bartender served alcoholic beverages to the motorist knowing that he was intoxicated.³⁴

The *Elsperman* court stated that the evidence in this case included several factors which could be considered in determining whether the motorist was intoxicated and whether the bartender had knowledge of his intoxication and thereafter served him alcohol in violation of the statute. This evidence included the motorist's alcohol consumption before arriving at the bar in question, the motorist's behavior while in the bar (he was loud and boisterous, but not vulgar, and put his arm around another man, telling him that he loved him — which was typical of his behavior while drinking), the fact that the motorist staggered when he walked to the bathroom, the small amount of food he ate at the bar, the amount of alcohol consumed at the bar, the motorist's condition shortly after leaving the bar (which included testimony from the investigating police officers that there was a strong odor of alcohol on the driver, his eyes were bloodshot, his speech was slurred, he had difficulty with motor functions and had a great deal of difficulty removing his driver's license from his wallet, he refused a chemical intoxication test, and, in the opinion of one officer, he was very intoxicated), the fact that someone offered to drive the motorist home, the bartender's admission that he thought the motorist was "a little intoxicated" when he left the bar, the fact that the bartender accompanied the motorist out of the bar and watched him drive away, and the fact that, when the police arrived at the scene, the bartender told a part-time bartender who had observed the motorist in the bar to keep his mouth shut and stay out of it.³⁵ Based upon this evidence, the court in *Elsperman* concluded that the jury could have inferred that the motorist was intoxicated and that the bartender had served him alcoholic beverages knowing that he was intoxicated.³⁶

In *Whisman v. Fawcett*,³⁷ the plaintiff brought suit against an intoxicated driver and the bar where the driver had been drinking immediately prior to the collision. The plaintiff based his allegations of negligence against the bar on the violation of the criminal statute which prohibits furnishing alcohol to an habitual drunkard,³⁸ as well as upon the violation of the criminal statute which prohibits furnishing alcohol to a person known to be intoxicated.³⁹

³⁴*Id.* at 1030-31.

³⁵*Id.* at 1029-32.

³⁶*Id.* at 1032.

³⁷470 N.E.2d 73 (Ind. 1984).

³⁸IND. CODE § 7.1-5-10-14 (Supp. 1985). This statute provides:

It is unlawful for a permittee to sell, barter, exchange, give, provide, or furnish an alcoholic beverage to a person whom he knows to be a habitual drunkard.

Id.

³⁹IND. CODE § 7.1-5-10-15 (Supp. 1985). See *supra* text accompanying note 7.

The plaintiff conceded that the bar did not sell alcohol directly to the defendant-driver. In fact, the evidence revealed that the bartender refused to serve him directly.⁴⁰ However, the *Whisman* court stated that it is sufficient to show that "the seller knew or had good reason to believe when he sold the liquor that the purchaser intended to furnish it to another person whom the seller knew to be intoxicated."⁴¹ Despite this general statement of the law, the court in this case held that although there was strong evidence that the bartender knew the defendant-driver was intoxicated, the plaintiff failed to produce sufficient evidence to establish that the bartender knew or had reason to know that certain individuals to whom they sold alcohol were going to furnish it to the defendant-driver.⁴²

III. AN ANALYSIS OF *Ashlock v. Norris*

A. *The Extension of Dram Shop Liability to Anyone Furnishing Alcohol to an Adult Known to Be Intoxicated*

A recent Indiana case dealing with dram shop liability is *Ashlock v. Norris*.⁴³ In *Ashlock*, the administratrix of the estate of a deceased pedestrian who was struck and killed by an intoxicated motorist (Morrow) brought a wrongful death action against the motorist's friend (Norris). Norris had furnished Morrow with alcoholic beverages shortly before the fatal collision. The particular facts involved in this case include the following:

The facts favorable to the plaintiff disclose that after work on April 13, 1982, Cindy Morrow went to Butterfield's Restaurant and Lounge in Lafayette. She arrived at the lounge about 3:45 p.m. and ordered a tequila mixed drink. About 5:00 p.m. [defendant] Norris arrived at the lounge. He was previously acquainted with Morrow and joined her at the bar.

At 7:30 p.m. Morrow had consumed two tequila mixed drinks as well as three shots of tequila purchased for her by Norris. At about that time Morrow fell down while attempting to pick up her purse which she dropped. After resting for several moments Morrow was able to regain her feet only with Norris' assistance. He then assisted her in leaving the lounge and helped her into her car. He then spent several minutes in an unsuccessful attempt to persuade Morrow not to drive. She, however, insisted that she had to leave, and she did.

⁴⁰*Whisman*, 470 N.E.2d at 78.

⁴¹*Id.*

⁴²*Id.* at 79.

⁴³475 N.E.2d 1167 (Ind. Ct. App. 1985).

About a mile from the lounge Morrow attempted to pass a car on the right. As she did she struck and killed Anthony Ashlock who was jogging along the shoulder of the road about ten feet from the travelled portion of the highway. Morrow continued to drive down the road, approximately two miles, until she drove into a ditch.⁴⁴

The trial court granted the defendant's motion for summary judgment, and the administratrix of the decedent's estate appealed. The issue on appeal was whether Norris owed any duty to the decedent.⁴⁵ The administratrix argued that Indiana Code section 7.1-5-10-15 created such a duty in providing that "[i]t is unlawful for a *person* to sell, barter, deliver, or *give away* an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated."⁴⁶ The appellate court held that the language of the statute indicated that the legislature probably intended to extend civil liability to family, friends, or acquaintances who furnish "one more drink" to an intoxicated person.⁴⁷ Furthermore, the *Ashlock* court held that sound public policy supported this extension.⁴⁸ Therefore, the court concluded that the administratrix had stated a claim for which relief could be granted.⁴⁹

Ashlock is the first Indiana case to extend civil liability, based upon a violation of Indiana Code section 7.1-5-10-15, to an individual who merely furnished (as opposed to having sold) liquor to an adult. The *Ashlock* court did not appear to have any difficulty expanding the scope of liability, citing *Brattain*, which had extended civil liability based upon furnishing (as opposed to selling) alcoholic beverages to a minor.⁵⁰ The court in *Ashlock* specifically noted that all of the prior Indiana dram shop cases except *Brattain* sought to impose liability upon either an establishment engaged in the business of selling alcohol or the bartender involved in such sale. However, it apparently had no difficulty in concluding that the plain language of Indiana Code section 7.1-5-10-15 applies to *natural persons* who merely *give* alcoholic beverages to another person whom they know to be intoxicated.⁵¹ In other words, the case law

⁴⁴*Id.* at 1168.

⁴⁵*Id.* The administratrix originally filed suit against the corporate owner of the bar, two bartenders, and Norris. However, all the defendants except Norris were previously dismissed with prejudice upon plaintiff's motion. *Id.*

⁴⁶*Id.* (quoting IND. CODE § 7.1-5-10-15 (Supp. 1985)) (emphasis added).

⁴⁷*Id.* at 1169.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.* (citing *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974)). See also *supra* text accompanying notes 18-24.

⁵¹*Id.* at 1169. The court stated:

apparently recognizes no distinction between the duty imposed upon a seller and a gratuitous provider or between a natural person and a business entity.

The enactment of the new civil dram shop statute confirms the court's holding in *Ashlock* that a "sale" of alcohol is not a necessary prerequisite for dram shop liability. The statute specifically provides that furnishing an alcoholic beverage to an intoxicated person is sufficient to impose civil liability and defines "furnish" as including bartering, delivering, selling, exchanging, providing, or giving away.⁵²

B. The Knowledge Requirement

After determining that a civil duty existed under the facts of this case, the *Ashlock* court considered whether there was a genuine issue of material fact as to Norris' knowledge of Morrow's intoxication at the time he bought her last drink. By its terms, Indiana Code section 7.1-5-10-15 prohibits the selling, bartering, delivering, or giving away of an alcoholic beverage by one person to another who is intoxicated if the former *knows* of the latter's intoxication.⁵³ The new civil dram shop statute is also worded in terms of a person furnishing an alcoholic beverage to another whom he knows to be visibly intoxicated.⁵⁴ These statutory sections would appear to establish a subjective standard based upon the provider's actual knowledge.

Indiana courts in dram shop cases have repeatedly applied an objective standard of knowledge; however, none of these applications concerned knowledge of intoxication. In *Elder v. Fisher*,⁵⁵ the court held that a complaint alleging that the defendant druggist sold alcoholic beverages to an individual who he *knew or, in the exercise of ordinary care, should have known* was a minor was sufficient to state a cause of action.⁵⁶ In *Brattain v. Herron*,⁵⁷ the evidence revealed that the defendant knew that the person to whom she furnished alcoholic beverages was a minor and that *she knew, or by the exercise of reasonable*

Indeed the legislature has specifically defined "person" to include any "natural" person (I.C. 7.1-1-3-31) and has made the statutory proscription applicable to a person, rather than to a "permittee."

Id.

The *Ashlock* court, however, rejected the argument that Norris was negligent in helping the intoxicated motorist to her vehicle and then allowing her to drive. The court held that, absent some special relationship between Norris and the intoxicated motorist, Norris had no duty to the public to control Morrow's use of her automobile. *Id.* at 1171.

⁵²Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁵³IND. CODE § 7.1-5-10-15 (Supp. 1985). See *supra* text accompanying note 7 for the relevant text of this statute.

⁵⁴Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁵⁵247 Ind. 598, 217 N.E.2d 847 (1966).

⁵⁶*Id.* at 601, 607, 217 N.E.2d at 848, 853 (1966).

⁵⁷159 Ind. App. 663, 309 N.E.2d 150 (1974).

care, should have known that he would be operating his automobile on the highway as soon as he left her home.⁵⁸ In *Whisman v. Fawcett*,⁵⁹ the court upheld the decision of the trial court to the effect that evidence was insufficient to show that the defendant's bartenders *knew, or had reason to know*, when they sold the alcohol that the purchasers would give it to the intoxicated driver.⁶⁰

Although Indiana Code section 7.1-5-10-15 is worded in terms of providing alcohol to a person *known* to be intoxicated,⁶¹ and the court in *Ashlock* stated the issue in terms of whether Norris *knew* that the driver was intoxicated at the time he provided her with her last drink,⁶² the factual analysis upon which the court based its decision suggests that perhaps this is not a strictly subjective standard. In considering this issue, the *Ashlock* court stated:

It would be proper to prove by circumstantial evidence that Norris knew Morrow was intoxicated before he last provided her a drink. As the Court pointed out in *Elsperman*, . . . there are many factors which can be considered in determining whether a person was intoxicated to another person's knowledge, including what and how much the person was known to have consumed, the time involved, the person's behavior at the time, and the person's condition shortly after leaving.⁶³

The court also pointed out that, although Norris denied that the driver appeared intoxicated, he was with her for two and one-half to three hours, during which time she consumed five drinks, each containing one ounce of tequila.⁶⁴ The court specifically noted that there was no expert testimony submitted to establish the probable effect of consuming that amount of alcohol in that time period upon either Morrow specifically or upon the average individual with her physical makeup.⁶⁵ This suggests that the court might have found such evidence relevant and of some probative value. The court also pointed out that within thirty minutes after receiving her last drink, the driver was so intoxicated that she could not maintain her balance or walk without assistance.⁶⁶ The court stated that the evidence outlined above, *standing alone*, would probably be sufficient to grant judgment on the evidence in favor of the defendant.⁶⁷

⁵⁸*Id.* at 666, 309 N.E.2d at 152.

⁵⁹470 N.E.2d 73 (Ind. 1984).

⁶⁰*Id.* at 79.

⁶¹*See supra* text accompanying note 7.

⁶²*Ashlock*, 475 N.E.2d at 1170.

⁶³*Id.* (citing *Elsperman v. Plump*, 446 N.E.2d 1027, 1031 (Ind. Ct. App. 1983)).

⁶⁴*Id.* at 1170-71.

⁶⁵*Id.* at 1171.

⁶⁶*Id.*

⁶⁷*Id.*

The court further stated that "only speculation based upon the circumstances supports the determination that Norris was aware Morrow was intoxicated when he last provided her a drink."⁶⁸ However, because this case arose in the context of a motion for summary judgment, the court concluded that there was a genuine issue of material fact which had to be resolved in favor of the nonmovant.⁶⁹

Additional evidence in the case indicated that Norris saw the driver drop and spill her purse while in the bar. She lost her balance, fell, and was unable to rise without assistance.⁷⁰ Norris stated that the driver "appeared to be out of control" within one-half hour after receiving her last drink.⁷¹ While he accompanied her to her car, he attempted to dissuade her from driving.⁷² It is unclear whether, without Norris' apparent admissions concerning his knowledge of the driver's condition (his statement that the driver appeared out of control and his attempt to prevent her from driving), the appellate court would have decided that the evidence was sufficient to avoid summary judgment.

Although it may not be necessary under *Ashlock* for the defendant to admit that he knew the person to whom he supplied the alcohol was intoxicated in order for the plaintiff to sustain his burden of proof, the court left unclear whether constructive knowledge would be sufficient. The *Ashlock* court did not specifically discuss whether the person provided with the alcohol must be *visibly* intoxicated or whether the provider may draw upon his experiences in life to realize or predict the probable effect of a certain amount of alcohol. The court also did not discuss the relevance of the provider's familiarity with the intoxicated person's tolerance to alcohol or his familiarity with the intoxicated person's driving ability after drinking. That is, if the provider knew that the recipient was of a certain height and weight and had had X number of drinks within X period of time, could the provider avoid liability if the recipient was not manifesting any outward signs of intoxication at the time the last drink was provided? Or, would the courts impose a common sense standard and impute to the provider knowledge of the effects of that amount of alcohol on the recipient? In light of the *Ashlock* court's reference to expert testimony on this issue,³⁷ the decision suggests that it might have been proper to impute such knowledge to the provider.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* at 1170.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 1171. The court stated, "[N]othing was placed before the court on the motion for summary judgment to establish the probable effect of that much alcoholic beverage in that time span on either Morrow or an average person of her physical makeup." *Id.* See also *supra* text accompanying note 65.

To date, the Indiana dram shop cases have neither addressed the method of proving actual intoxication nor defined explicitly the term "intoxicated." However, based upon the conduct of the recipients in *Elsperman*⁷⁴ and *Ashlock*,⁷⁵ the decisions suggested that no particular blood alcohol level was required, and that intoxication could have been implied from the drinker's actions. The question remained under these decisions, however, whether, absent action that implied intoxication, expert testimony could be introduced concerning the effect of a certain amount of alcohol upon a person of a certain physical makeup.

The new civil dram shop statute appears to provide answers to some of these questions but leaves others unanswered. Although the statute does not provide that evidence of an individual's intoxication under Indiana Code section 9-11-1-7⁷⁶ (establishing that .10% or more by weight of alcohol in one's blood is *prima facie* evidence of intoxication) is conclusive evidence of intoxication in a civil action,⁷⁷ it would still appear that such evidence would be admissible for the jury to consider in reaching its verdict.

Additionally, no Indiana dram shop case to date has specifically held that constructive knowledge of intoxication was sufficient to impose liability. Generally, however, under Indiana law where knowledge is a required element in a tort action, constructive knowledge satisfies this requirement without a showing of actual knowledge.⁷⁸ Consequently, prior to the enactment of the new civil dram shop statute, it was not unreasonable to expect that courts might have been willing to impose liability (if they had not already done so) upon those who provided alcohol to persons who they knew, *or in the exercise of reasonable care should have known*, were intoxicated.

The new statute provides that a person must have had actual knowledge that the individual to whom he furnished alcohol was visibly intoxicated.⁷⁹ The implication of this language would appear to be that constructive knowledge of intoxication will not support a cause of action based upon the civil dram shop statute. However, as before, it seems improbable that a defendant will have to admit that he knew the individual was visibly intoxicated when he furnished him a drink. Certainly, the same type of circumstantial evidence used in *Ashlock* and other dram shop cases will continue to constitute probative evidence from which a jury may infer that the defendant had actual knowledge of the individual's state of intoxication. Even though a court will be unable to give a jury instruc-

⁷⁴*Elsperman*, 446 N.E.2d at 1032. See also *supra* text accompanying notes 35-36.

⁷⁵*Ashlock*, 475 N.E.2d at 1170-71. See also *supra* text accompanying notes 64-72.

⁷⁶IND. CODE § 9-11-1-7 (Supp. 1985).

⁷⁷Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5). A previous version of the bill expressly stated that such evidence would not be conclusive.

⁷⁸See, e.g., *Great Atlantic & Pacific Tea Co. v. Custin*, 214 Ind. 54, 15 N.E.2d 538 (1938).

⁷⁹Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

tion worded in terms of "knew or should have known," as a practical matter, one can reasonably assume that given compelling evidence of the individual's intoxication, a jury will conclude that the person to whom the alcoholic beverage was furnished was visibly intoxicated and that the defendant actually knew it.

C. *Possible Extensions of Ashlock v. Norris*

Neither the Indiana cases to date nor the new civil dram shop statute provides any basis for limiting the application of dram shop liability to a particular environment or setting. Other jurisdictions have imposed dram shop liability in the context of weddings, picnics, office parties, cocktail parties, and fraternity and sorority parties.⁸⁰ Therefore, it is reasonable to expect that Indiana will impose dram shop liability in similar situations.

Although all dram shop cases that have arisen in Indiana have involved automobile collisions caused by drunk drivers, these cases do not provide any obvious basis for limiting dram shop liability to that factual context. Because other jurisdictions have held the provider of alcoholic beverages to an intoxicated person liable for injuries and damages that result from fights, gunshot or knife wounds, and thrown objects,⁸¹ it is likely that Indiana will follow in that direction.

IV. DRAM SHOP LIABILITY BASED UPON FURNISHING ALCOHOLIC BEVERAGES TO A MINOR

With the enactment of the new civil dram shop statute, the legislature has made clear its intent to impose civil liability upon persons who

⁸⁰Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981) (plaintiff stated cause of action against employer-host of office Christmas party for injuries caused by employee-guest); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973) (plaintiff stated cause of action against sponsors of wedding reception for injuries caused by minor-guest); Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1981) (plaintiff stated cause of action against fraternity for injuries caused by minor attending fraternity party); Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295 (1984) (plaintiff stated cause of action against hosts of company Christmas party for injuries caused by company-employee who was a guest at the party).

⁸¹Clendening v. Shipton, 149 Cal. App. 3d 191, 196 Cal. Rptr. 654 (1983) (plaintiff stated cause of action against social host for injuries caused by guest who broke neck of another guest); Allen v. Babrab, Inc., 438 So. 2d 356 (Fla. 1983) (tavern owner held liable for injuries caused by patron who threw glass at fellow patron in tavern's parking lot, blinding her); Kiriluk v. Cohn, 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958) (tavern owner held liable for death of patron when patron's wife shot him after he returned from tavern so intoxicated that he chased her around kitchen and threatened her); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 245 N.E.2d 420 (1969) (tavern owner held liable for injuries caused by patron who shot another); Ollison v. Weinberg Racing Ass'n, Inc., 69 Or. App. 653, 688 P.2d 847 (1984) (plaintiff stated cause of action against race track for injuries caused by intoxicated race patron who fired gun causing stampede).

supply alcoholic beverages to an individual who is visibly intoxicated.⁸² Therefore, it will no longer be necessary to look to the criminal statute to establish a duty upon which dram shop liability may be imposed in such cases.

The legislature, however, failed to mention furnishing alcoholic beverages to minors in the new civil statute. Arguments can be made in support of two opposite conclusions which may be drawn from this omission. First, one can argue that Indiana Code section 7.1-5-7-8, which makes it a misdemeanor to sell, barter, exchange, provide, or furnish an alcoholic beverage to a minor whether or not he is visibly intoxicated, can still be used as the basis for a civil dram shop case because the civil statute does not specifically provide otherwise. On the other hand, an argument can be made that because the legislature did not include minors within the scope of the statute, furnishing alcoholic beverages to them if they are not visibly intoxicated should no longer be the basis for dram shop liability.

The legislative history of the new civil statute would appear to lend some support to both arguments. One proposed amendment to Senate Bill No. 85 would have required that a person be "proven by clear and convincing evidence to have furnished an alcoholic beverage to *a person under age twenty-one (21)*" or to a person known to be intoxicated.⁸³ Another proposed amendment provided that in order to impose civil dram shop liability, a person or establishment must be shown to have "knowingly, willfully, and intentionally furnished the alcoholic beverage to one who was obviously intoxicated or *known to be a minor*."⁸⁴ A third proposed amendment read in pertinent part:

A person who furnishes an alcoholic beverage is not liable for civil damages caused by the intoxication of the person to whom the alcoholic beverage was furnished, unless the person furnishing the alcoholic beverage has been convicted of an offense under IC 7.1-5-7-7 [which prohibits furnishing alcohol to minors] or IC 7.1-5-10-15⁸⁵

All of these proposed amendments included specific references to minors. However, they were all rejected, and the civil statute as enacted makes no mention of minors. As a result, an argument may be made that unless a minor is also visibly intoxicated at the time the alcoholic beverage is provided, no civil liability exists. However, eliminating liability

⁸²Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

⁸³Proposed amendment to Senate Bill No. 85 by Senator Vobach (emphasis added) (available in the *Indiana Law Review* Office).

⁸⁴Proposed amendment to Senate Bill No. 85 by Senator V.R. Miller (emphasis added) (available in the *Indiana Law Review* Office).

⁸⁵Proposed amendment to Senate Bill No. 85 by Senator Mills (available in the *Indiana Law Review* Office).

for those providing alcohol to minors would be a dramatic change from prior case law⁸⁶ and contrary to the strong public interest in discouraging the use of alcohol by minors. Therefore, absent a clear legislative mandate, it seems unlikely that courts will interpret the new civil statute as eliminating a cause of action based upon furnishing alcohol to a minor even though he is not visibly intoxicated.

V. DRAM SHOP LIABILITY UNDER INDIANA'S COMPARATIVE FAULT ACT

The impact of the *Ashlock* decision and the new civil liability statute cannot be properly analyzed without considering how Indiana's comparative fault statute⁸⁷ will affect dram shop liability. A brief analysis of the pertinent parts of the Act and their anticipated effect upon dram shop cases follows.

Simply stated, the Indiana Comparative Fault Act provides that, in an action based upon "fault," a claimant's contributory negligence is no longer an absolute bar to his recovery.⁸⁸ Rather, his compensatory damage award will be reduced in proportion to his fault unless his contributory fault is greater than the combined fault of the other tortfeasors who proximately contributed to the claimant's damages.⁸⁹ For example, in a two-party situation, if the plaintiff is fifty percent at fault, the plaintiff will still recover fifty percent of his damages, but if the plaintiff is fifty-one percent at fault, he will not recover because his negligence is greater than that of the defendant.

A. The "Nonparty" Or "Empty Chair" Defense

One of the more controversial sections of the Indiana Comparative Fault Act is the nonparty or "empty chair" defense provision.⁹⁰ This

⁸⁶*Elder*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Brattain*, 159 Ind. App. 663, 309 N.E.2d 150 (1974). This conclusion would also follow from the well known principle that statutes in derogation of the common law are to be strictly construed. See, e.g., *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Manners v. State*, 210 Ind. 648, 5 N.E.2d 300 (1937).

⁸⁷IND. CODE §§ 34-3-33-1 to -13 (Supp. 1985).

⁸⁸IND. CODE § 34-4-33-3 (Supp. 1985). This section provides:

In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.

Id.

⁸⁹IND. CODE §§ 34-4-33-4 and -5 (Supp. 1985).

⁹⁰IND. CODE § 34-4-33-10 (Supp. 1985). Subsection (a) provides:

In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.

Id.

provision allows a defendant to raise as an affirmative defense the negligent conduct of a nonsued tortfeasor.⁹¹ The jury then, in assessing fault, must determine the percentage of fault attributable to the nonparty.⁹² Consequently, the plaintiff's recovery against a single named party-defendant can be diminished not only by the percentage of his own fault, but also by the percentage of fault allocated to any nonparties.

At this time there is some confusion as to who can be a nonparty under the Indiana Comparative Fault Act. In the section pertaining to forms of verdicts and disclosure requirements, the Act provides in relevant part:

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict . . . shall require a disclosure of the *name of the nonparty* and the percentage of fault charged to the nonparty.⁹³

This section has been interpreted to mean that a defendant must specifically designate the name of a nonparty before the jury can allocate any fault to that nonparty.⁹⁴ A counterargument, however, can be made that if the legislature had intended that interpretation, it would have included a requirement that the defendant specifically name any nonparties when raising a nonparty defense. However, nowhere in the section providing for nonparty defenses is a defendant required to provide the name of the nonparty.⁹⁵

The courts' future interpretation of the statutory language relating to named tortfeasors could have significant implications in dram shop litigation. For example, suppose a drunk driver collides with and severely injures an individual who is totally free from fault. Suppose further that the drunk driver was so intoxicated that he was unable to remember the name of the tavern where he had become intoxicated prior to the collision. However, he was able to remember that he had been drinking at a tavern. If the defendant-drunk driver is not required to provide the name of the tavern before the jury could allocate any fault to the tavern, then the defendant would be allowed to point his finger at the nonparty-tavern in an attempt to reduce his percentage of fault. If, on the other hand, the defendant-drunk driver is required to provide the exact identity of the tavern and is unable to do so, then the defendant-drunk driver would be prevented from arguing that he is anything less than one hundred per cent at fault. The latter alternative would be more

⁹¹*Id.*

⁹²IND. CODE § 34-4-33-6 (Supp. 1985).

⁹³*Id.* (emphasis added).

⁹⁴Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 920 (1984).

⁹⁵IND. CODE § 34-4-33-10 (Supp. 1985).

favorable to the plaintiff because named defendants could not escape complete liability without providing the exact identity of a nonparty. If future courts decide that a defendant must specifically identify a nonparty before any fault could be assessed to him, a defendant-drunk driver would not be allowed to describe a nonparty tavern as "the tavern where I was drinking prior to the collision." The defendant-drunk driver, instead, would have to present evidence of the proper name of the tavern.

*B. Joint and Several Liability in Dram Shop
Cases Under the Comparative Fault Act*

An equally controversial feature of the Indiana Comparative Fault Act is its apparent abolition of joint and several liability.⁹⁶ Although nowhere does the Act expressly state that joint and several liability has been abrogated either partially or completely, the jury instructions relating to multiple defendants⁹⁷ could be interpreted as abolishing this common law doctrine.⁹⁸ The instructions require the jury to enter a verdict against each defendant by multiplying each defendant's percentage of fault by the total amount of damages.⁹⁹ Contrary to the common law principles of joint and several liability, this could mean that a defendant may no longer be responsible for all the plaintiff's damages, but only those caused by his fault.¹⁰⁰

However, arguments have been made that the Indiana Comparative Fault Act retains the concept of joint and several liability.¹⁰¹ These arguments are in part based on the fact that the Act contains no substantive provision abolishing joint and several liability.¹⁰² The only indication that joint and several liability has been abolished is found in the jury instructions which require allocation of fault to the claimant, each defendant, and any nonparties.¹⁰³ If one assumes that the purpose of the jury instructions is to assist juries in performing their computations, as opposed to affecting the Act substantively, one might argue successfully

⁹⁶Joint and several liability has been defined as follows in Indiana:

Where an injury is caused by the concurrent negligence of two parties, the injured person may recover from either or both, and neither can successfully interpose as a defense the fact that the concurrent negligence of the other contributed to the injury.

Indian Refining Co. v. Summerland, 92 Ind. App. 429, 432, 173 N.E. 269, 270 (1930).

⁹⁷IND. CODE § 34-3-33-5(b) (Supp. 1985).

⁹⁸Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 703-05 (1984).

⁹⁹IND. CODE § 34-3-33-5(b)(4) (Supp. 1985).

¹⁰⁰Wilkins, *supra* note 98, at 703-05.

¹⁰¹*Id.* at 705-17.

¹⁰²*Id.* at 705-08.

¹⁰³IND. CODE § 34-4-33-5(b) (Supp. 1985). *See also* Wilkins, *supra* note 98, at 707.

that a strict construction of the Act does not abolish joint and several liability.¹⁰⁴

If the Act has indeed abolished joint and several liability, plaintiffs who are totally free from fault will unfortunately be penalized the most. Before the enactment of the comparative fault statute, a plaintiff free from contributory negligence was allowed to recover the full amount of his damages against any one defendant regardless of that defendant's proportional fault.¹⁰⁵ For example, in a typical dram shop situation, the plaintiff generally brings suit against the defendant-drunk driver and the defendant-tavern. Often the defendant-drunk driver has little or no insurance. The tavern is more likely to have insurance sufficient to cover the plaintiff's damages. Therefore, under the common law doctrine of joint and several liability, the innocent plaintiff could recover his entire judgment against the tavern and would be fully compensated despite the fact that the defendant-drunk driver had little or no insurance. If joint and several liability has, however, been abolished under the Act, the plaintiff in this situation would be fully compensated only if the defendant-tavern was found to be one-hundred percent at fault. In other words, if the jury finds the defendant-drunk driver eighty percent at fault and the defendant-tavern twenty percent at fault, the plaintiff will only receive twenty percent of his total damages.

A consideration of public policy, including an analysis of who is better able to bear losses, whether it be innocent plaintiffs or businesses and insurance companies, leads to the conclusion that the retention of joint and several liability is the better policy. Future courts will be confronted with competing arguments for the abolition or retention of joint and several liability. In weighing policy considerations, courts should be mindful that forcing totally innocent plaintiffs to bear losses caused by someone else's fault does not benefit society as a whole and has never been the purpose of tort law.¹⁰⁶

C. Settlement of Dram Shop Cases Under the Comparative Fault Act

In dram shop cases involving multiple defendants, the Indiana Comparative Fault Act will affect the decision regarding whether a settlement should be made with one or more defendants prior to trial. The tortfeasor with whom the plaintiff reaches a settlement before trial will most often be a nonparty to whom the jury must assess fault.¹⁰⁷ The goal of

¹⁰⁴Wilkins, *supra* note 98, at 707-08.

¹⁰⁵See *supra* note 96 and accompanying text.

¹⁰⁶W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS ch. 1, § 4 (5th ed. 1984). See also Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV. 925, 936-38 (1984).

¹⁰⁷Eilbacher, *supra* note 94, at 908-09.

nonsettling defendants at trial will be to maximize the percentage of negligence attributed to settling tortfeasors.¹⁰⁸ On the other hand, the goal of the plaintiff at trial will be to persuade the jury that the settling tortfeasor's degree of fault was minimal.¹⁰⁹

There may be instances in which the drunk driver carries little or no automobile liability insurance. Therefore, it may be advisable in such cases to settle with the drunk driver and proceed to trial against the tavern, tavern owner, bartender, or friend who supplied the drunk driver with alcohol. Because a drunk driver is often the most culpable defendant in dram shop cases and would not generally make a sympathetic nonparty, plaintiff's counsel will be placed in the difficult position of "defending" the drunk driver in an attempt to reduce the percentage of fault which the jury attributes to him.

D. Causation in Dram Shop Cases Under the Comparative Fault Act

Indiana's Comparative Fault Act has retained the requirements of both cause in fact and proximate cause in negligence actions.¹¹⁰ As the court in *Elder v. Fisher*¹¹¹ pointed out, proximate cause is often a crucial issue in dram shop cases.¹¹² The *Elder* court stated:

The crucial issue in all of the cases involving liability of a seller of alcoholic beverages seems to be the matter of proximate cause. Many of the cases constantly cited have arbitrarily held that the selling of the intoxicating liquor is too remote in time to be a proximate cause of resulting injuries.

However, it is well settled that for a negligent act or omission to be a proximate cause of injury, the injury need be only a natural and probable result thereof; and the consequence be one which in the light of circumstances should reasonably have been foreseen or anticipated.¹¹³

In future dram shop cases under comparative fault, defendant-suppliers of alcohol will attempt, as in the past, to avoid liability by arguing that providing the alcoholic beverage is too remote to be a proximate cause of the resulting injury. Thus, a defendant-supplier will allege that

¹⁰⁸*Id.* at 909.

¹⁰⁹*Id.*

¹¹⁰IND. CODE § 34-4-33-1(b) (Supp. 1985). This subsection provides:

In an action brought under this chapter, legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault.

Id. See also Pardieck, *supra* note 106, at 931-32.

¹¹¹247 Ind. 598, 217 N.E.2d 847 (1966).

¹¹²*Id.* at 605, 217 N.E.2d at 852. Indeed, the new civil statute expressly provides that the intoxication must have been a proximate cause of the injury. Senate Bill No. 85 (to be codified at IND. CODE § 7.1-5-10-15.5).

¹¹³*Id.*

the defendant-drunk driver's culpable conduct is an intervening or superseding cause, thereby relieving him from liability. However, in view of increasing public awareness of the dangers associated with drinking and driving, plaintiffs should be able to convince a jury that suppliers of alcohol could reasonably foresee that providing alcoholic beverages to an already intoxicated person or to a minor could result in injurious consequences. Furthermore, it seems that juries would be more reluctant to classify a defendant-supplier's conduct as a "remote" cause or a defendant-drunk driver's conduct as an "intervening" or "superseding" cause under a system in which more equitable results can be obtained by the apportionment of fault and damages.

*E. Incurred Risk and Unreasonable Assumption of Risk
in Dram Shop Cases Under the Comparative Fault Act*

The Indiana Comparative Fault Act specifically includes "unreasonable assumption of risk not constituting an enforceable express consent" and "incurred risk" in its definition of fault.¹¹⁴ Because assumption of risk and incurred risk are to be treated as comparative "fault," such conduct on the part of a plaintiff will no longer totally bar his recovery. Rather, the fact that the plaintiff knows, understands, and appreciates any risks, and the fact that he voluntarily encounters them will be considered by the jury in apportioning fault.

In cases such as *Parrett v. Lebamoff*,¹¹⁵ where the intoxicated individual makes a claim for personal injuries against the individual or entity that provided him with alcohol, contributory negligence and incurred risk will no longer totally bar his claim. Such a claimant would thus be able to recover for his own injuries arising from an alcohol-related automobile accident. Because an intoxicated individual may be able to recover a portion of his damages despite some negligence or incurred risk on his own part, cases such as *Parrett* may now have more appeal to plaintiffs' lawyers than they did prior to the enactment of the comparative fault statute. The Indiana statute provides that a plaintiff who is fifty percent at fault can still recover fifty percent of his damages.¹¹⁶ It would appear that a plaintiff's lawyer could successfully argue that in a case where someone provided an already visibly intoxicated plaintiff with more alcohol or provided a minor-plaintiff with alcohol, that this plaintiff was not more than fifty percent at fault. Conversely, in these types of cases, defense counsel will emphasize that plaintiff's own contributory negligence or incurred risk was the sole proximate cause of the collision or at least exceeded fifty percent, thereby relieving the defendant from liability.

¹¹⁴IND. CODE § 34-4-33-2(a) (Supp. 1985).

¹¹⁵408 N.E.2d 1344 (Ind. Ct. App. 1980). See also *supra* text accompanying notes 25-29.

¹¹⁶IND. CODE § 34-4-3-4 (1985). See also *supra* text accompanying notes 88-89.

VI. CONCLUSION

*Ashlock v. Norris*¹¹⁷ and the newly enacted civil dram shop statute illustrate the current trend extending dram shop liability beyond the tavern, tavern owner, or bartender. *Ashlock* extends dram shop liability to a patron in a bar who provides an already intoxicated fellow patron with alcohol. The new civil statute, enacted after the *Ashlock* decision, does not limit the class of persons to whom dram shop liability may be applied. In fact, it specifically states that it applies to anyone who barter, delivers, sells, exchanges, provides, or gives away an alcoholic beverage to one who is known to be visibly intoxicated. Therefore, it appears that civil liability will be imposed upon *anyone* who supplies alcoholic beverages, whether in exchange for payment or gratuitously, to an already visibly intoxicated individual if that individual later causes harm to others.

The court in *Ashlock* did not resolve the issue whether the provider must have actual knowledge of an individual's intoxication or whether constructive knowledge will be sufficient to impose dram shop liability. In response to increasing public outcry to the carnage caused by drunk drivers, it was not unreasonable to expect that Indiana courts would have concluded that constructive knowledge would support a cause of action. However, the enactment of the new civil dram shop statute has eliminated the likelihood that a court will instruct the jury on constructive knowledge. Nevertheless, juries will still be able to draw inferences from circumstantial evidence to conclude the defendant actually knew the individual was intoxicated.

Indiana's Comparative Fault Act will certainly have an impact on dram shop liability. However, many questions remain unanswered about the Act. At this time, it is unknown who may be a nonparty and whether joint and several liability has been abolished. Consequently, the extent of the impact of the comparative fault statute on dram shop liability will be left in the hands of future courts. It is hoped, however, that these courts will interpret the Act to protect plaintiffs fully who have been injured by negligent suppliers of alcohol.

¹¹⁷475 N.E.2d 1167 (Ind. Ct. App. 1985).

The Indiana Mandatory Seatbelt Use Law and Its Effect upon Automobile Tort Litigation

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I. INTRODUCTION

The Indiana General Assembly passed legislation in the 1985 session which answered some questions about the effect comparative fault would have upon the availability of the seatbelt defense. Although assertion of the seatbelt defense has enjoyed relatively little success, defense attorneys continue to assert it. Advocates of the defense were encouraged with the news that the Indiana legislature was considering the enactment of a statute requiring passengers and drivers in moving automobiles to wear body restraints. The optimism was based upon the knowledge that Indiana courts had refused to declare a duty to wear safety devices and had clearly revealed their intention to defer to the legislature for the creation of such a duty.¹ With the passage of chapter 9-8-14 of the Indiana Code, the General Assembly created the duty to wear the restraints, ending nearly eighteen years of anticipation by seatbelt defense advocates. Optimism about being able to rely upon the newly-created duty for support in defending automobile tort cases was also ended, however, because the statute very strictly limits the application of the duty. Instead legal minds are no doubt at work attempting to find a chink in the statute's language that will enable the defense to be raised despite the legislative limitations. This Article will examine the statute for its effect upon the civil law rather than the criminal law of which it is a part. The examination will be conducted from the standpoint of the law of torts, including a consideration of the connection between the statute and the common law of negligence and the statutory law of comparative fault.

Important precepts in the arguments by advocates of the seatbelt defense have been that employment of some type of body restraint promotes safer automobile use,² and that ordinary and prudent care would include the use of any available device which reduces the risk of injury.³ Several courts which have considered the matter have been

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¹See *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981).

²See National Highway Traffic Safety Administration studies and summaries of testimony accompanying amendment to 49 C.F.R. § 571.208, 49 Fed. Reg. 28,962, 28,986-91 (1984).

³*Truman v. Vargas*, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); *Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984); *Spier v. Barker*, 35 N.Y.2d

reluctant to accept those precepts as a matter of common law.⁴ With legislative pronouncement of a duty to wear the devices, seatbelt defense advocates gain a powerful ally in the argument that a plaintiff who has failed to use one has failed to exercise ordinary and prudent care. A detailed look at the Indiana statute, however, readily demonstrates that the General Assembly did not fully embrace the assertion that body restraints contribute to motoring safety. Importantly, not all passengers of motor vehicles are required to employ the devices, but only

[e]ach front seat occupant of a passenger motor vehicle that is equipped with a safety belt meeting the standards stated in the Federal Motor Vehicle Safety Standard Number 208 (49 C.F.R. 571.208) shall have a safety belt properly fastened about the occupant's body at all times when the vehicle is in forward motion.⁵

A complicated sentence which, by general reference, incorporates definitions contained in other chapters of the motor vehicle code, declares that the words "passenger motor vehicle" mean "[e]very motor vehicle designed for carrying passengers except a motorcycle, bus or school bus."⁶ In another provision, however, "buses, school buses and private buses" are placed back in the definition, and "trucks, tractors,⁷ and recreational vehicles" are specifically excluded.⁸ Furthermore, section two of the statute declares that:

This chapter does not apply to a front seat occupant who:

- (1) for medical reasons should not wear seatbelts;
- (2) is required to be restrained under the the child passenger restraint law (IC 9-8-13);

444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

⁴*Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976); *Fischer v. Moore*, 183 Colo. 392, 517 P.2d 458 (1973); *Kavanaugh v. Butorac*, 140 Ind. App. 139, 221 N.E.2d 824 (1966); *Cierpisz v. Singleton*, 247 Md. 215, 230 A.2d 629 (1967); *Romankewiz v. Black*, 16 Mich. App. 119, 167 N.W.2d 606 (1969); *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968); *Amend v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977). See Note, *Oklahoma and the Seat Belt Defense; Should Fields be Reconsidered?*, 10 OKLA. CITY U. L. REV. 153 (1985) for a discussion of these cases and citations to many others.

⁵IND. CODE § 9-8-14-1 (Supp. 1985).

⁶*Id.* § 9-1-1-2(x) (Supp. 1985).

⁷"Tractors," as defined in IND. CODE § 9-1-1-2(g), means "[e]very motor vehicle designed and used primarily for drawing or propelling trailers, semitrailers or vehicles of any kind, except a 'farm tractor,' 'farm tractor used in transportation' as defined herein, or a tractor which is used exclusively for drawing a passenger-carrying semitrailer." Thus, drivers and passengers of most commercial freight hauling vehicles are not covered by the statute.

⁸IND. CODE § 9-8-14-1 (Supp. 1985).

- (3) is traveling in a commercial or United States Postal Service vehicle that makes frequent stops for the purpose of pickup or delivery of goods or services;
- (4) is a rural carrier of the United States Postal Service and is operating a vehicle while serving a rural postal route; or
- (5) is a newspaper motor route carrier or newspaper bundle hauler who stops to make deliveries from his vehicle.⁹

Before starting a detailed analysis of the limitations of the statute, it may be helpful to examine its relationship to the common law of negligence. In so doing, a background of interconnected legal principles and patterns should be established which will enable a more precise evaluation of the ultimate effect of the statute upon existing law.

II. THE SEATBELT DEFENSE IN INDIANA

A. *The Statute and the Standard of Care*

Under certain circumstances, violation of a criminal statute may have critical bearing on the actor's civil liability. If the statute is designed to promote safety, requires a particular course of conduct of an actor, and the injury addressed is of the same type as that which is the subject of the controversy between tort litigants, the statute may be applied in lieu of the common law standard of care. The precise final effect of the application varies according to jurisdictional approaches and type of statute. The approaches range from consideration as mere evidence of the actor's negligence to a position where the violation will raise a conclusive presumption of negligence.¹⁰ Between the polar ends of the spectrum is a middle position which considers proof of a violation "prima facie" establishment of negligence. In all approaches, the utility of the statute is to permit the triers of law and fact to look to the legislature rather than the common law as the source and specification of the standard of care to be exercised in the circumstances. The abstract standard of the reasonably prudent person is replaced by a more precise prescription or proscription of conduct against which the actor's conduct may be compared. As in an ordinary negligence case, the breach of the standard of care (here either proved or suggested by proof of a failure to buckle up) must be shown to have been a producing cause of the

⁹*Id.* § 9-8-14-2 (Supp. 1985).

¹⁰See generally PROSSER AND KEETON, *THE LAW OF TORTS* 220 (5th ed. 1984); Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 SANTA CLARA L. REV. 427 (1983), and authorities cited therein. It is not clear which position the Indiana courts are committed to. See *Zimmerman v. Moore*, 441 N.E.2d 690, 696 (1982).

injury. The statute may be used to set the standard of care for establishing the plaintiff's contributory fault as well as the defendant's primary fault.¹¹

On this plane of analysis, as far as it goes, the Indiana seatbelt statute would seem to satisfy the general requirements for the application of the legislative standard to complaints arising from automobile accidents in which the plaintiff failed to wear the required body restraints. That the statute is designed for safety is abundantly evidenced by the reference to passenger restraints as "*safety belts*" and the later provision that:

[t]he bureau of motor vehicles, in cooperation with the department of highways, division of traffic safety, shall develop and administer educational programs for the purpose of informing the general public of the benefits that will inure to passengers using safety belts.¹²

The enactment does more than express a general legislative concern for safety, but actually requires persons subject to it to wear the restraints, thereby imposing a particular course of conduct upon certain users of motor vehicles. A defendant in an automobile tort case may face difficulties in establishing the requisite causal connection between the failure to buckle up and the injuries incurred by the plaintiff, about which more will be said later, but on its face, an argument that plaintiff would not be before the court with the injuries alleged had a body restraint been worn has logical appeal.

B. Restrictions on Use of the Seatbelt Defense

Had the seatbelt law contained no more, persons injured in automobile accidents who had failed to buckle up would have difficulty obtaining full recovery for those injuries. Indiana case law had long established that the seatbelt defense was conceptually related to principles of comparative fault and that until the legislature enacted comparative fault and a duty to buckle up, the defense would not be recognized.¹³ With

¹¹See *New York Central Railroad Co. v. Glad*, 242 Ind. 450, 179 N.E.2d 571 (1962); *Larkins v. Kohlmeyer*, 229 Ind. 391, 98 N.E.2d 896 (1951); *Gasich v. Chesapeake & Ohio R. Co.*, 453 N.E.2d 371 (Ind. App. 1983); *Anderson v. Pre-Fab Transit Co., Inc.*, 409 N.E.2d 1157 (Ind. App. 1980); *Anderson v. Baker*, 166 Ind. App. 324, 335 N.E.2d 831 (1975); *Rosenbalm v. Winski*, 165 Ind. App. 378, 332 N.E.2d 249 (1975); *Bixenman v. Hall*, 141 Ind. App. 628, 231 N.E.2d 530 (1968).

¹²IND. CODE § 9-8-14-4 (Supp. 1985).

¹³*State v. Ingram*, 427 N.E.2d 444 (Ind. 1981); *Volkswagenwerk v. Watson*, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); *Rhinebarger v. Mummert*, 173 Ind. App. 34, 362 N.E.2d 184 (1977); *Gibson v. Henninger*, 170 Ind. App. 55, 350 N.E.2d 631 (1976); *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 312 N.E.2d 104 (1974); *Kavanaugh v. Butorac*, 140 Ind. App. 139, 221 N.E.2d 824 (1967). *But cf.* *Mays v. Dealer Transit, Inc.*, 441 F.2d 1344 (7th Cir. 1971) (court found that the *Kavanaugh* decision, then the only reported opinion on the topic in Indiana, was not dispositive of the issue

the legislature having embraced both comparative fault and a duty to use body restraints, the way was opened for the defense to defeat or reduce recovery in proper cases when the statute goes into effect on July 1, 1987.¹⁴

The General Assembly was unwilling to extend the scope of the seatbelt statute so far, however. The statute is not just a simple declaration of new criminal law.¹⁵ The statute specifically addresses the occasion when a party to a civil action seeks to admit violation of the statute into the case. Section five of the enactment severely limits the applicability of the law in automobile accident litigation. In effect, the legislature has curtailed the development of the seatbelt defense before it could truly be born in Indiana.

Section five's limitations are that "[f]ailure to comply with this chapter does not constitute fault under IC 34-4-33 and does not limit the liability of an insurer. Evidence of the failure to comply with this chapter may not be admitted in any civil action to mitigate damages."¹⁶ Compliance with this language means that a person who would seek an apportionment of damages under comparative fault cannot do so with evidence of the other party's failure to wear body restraints. Because of the peculiar way in which the legislature has stated the limitations, however, the seatbelt defense may yet be asserted and recognized in Indiana courts. The remainder of this article will consider some ways that might be done.

III. OTHER AVENUES FOR ASSERTING THE SEATBELT DEFENSE

A. *Statutory Interpretation and the Definition of "Fault"*

One approach would be to assert that the legislature's limitation pertaining to "fault" does not prevent the defense from being raised in cases where the comparative fault act's definition is not controlling. In order for a party to a tort action based upon fault to obtain an apportionment of damages, the proponent of apportionment must show that the opponent has engaged in conduct which satisfies the statutory

and that Indiana law did not preclude the trier of fact from considering whether failure to use safety belts was a breach of due care and whether the failure was a "causative factor in the production of injury.") 441 F.2d at 1353-54.

¹⁴For a discussion of the applicability of a seatbelt defense and other failures to employ available safety devices under the comparative fault act *without* a legislative pronouncement of a duty to use the devices, see Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 795-800 (1984).

¹⁵The statute makes it a Class D infraction to be found guilty of not wearing a seatbelt. A Class D infraction, newly created in the seatbelt law, permits a fine of up to twenty-five dollars. IND. CODE §§ 9-8-14-6(a) and 34-4-32-4(d) (1982 & Supp. 1985).

¹⁶IND. CODE § 9-8-14-5 (Supp. 1985).

definition of "fault."¹⁷ "Fault" has meaning under the comparative fault act far different from its common law meaning. It is not simply substandard conduct which is not condoned by society, but it

includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.¹⁸

Several elements of the definition would seem to apply to the decision not to buckle up. As propounded by advocates of the seatbelt defense, the failure to use safety devices amounts to contributory negligence, assumption of risk, recklessness, and failure to avoid future injury.¹⁹ The seatbelt law's pronouncement that the decision not to use the devices shall not constitute "fault" thus covers a broad spectrum of characterizations which otherwise might have given the seatbelt defense life. If the statute had said merely that failure to fasten one's seatbelt was not to be considered negligence, for example, all of the other aspects of statutory "fault" would be left open as receptacles for arguing that the conduct of the plaintiff is adequate basis for apportionment of damages.

Most avenues seem to be closed for characterizing the conduct in a way which circumvents the definition. Because the failure to use seatbelts has been declared not to be "fault," and because apportionment is dependent upon a finding of "fault," the legislature has removed the possibility of the defense satisfying the necessary antecedent for apportionment of damages.

As if anticipating efforts to find ways around the exclusion from "fault," the General Assembly inserted the sentence that evidence of failure to comply is not admissible to mitigate damages.²⁰ The two sentences are extremely strong indicators that the legislators did not wish the defense to arise in comparative fault litigation.

Comparative fault litigation is not coextensive with the universe of automobile litigation, however. The legislature did not declare the defense

¹⁷Attorneys accustomed to litigating tort cases at common law should quickly become accustomed to referring to the statute frequently and carefully to determine the precise shape of the new law of comparative fault. The statute is not simply a declaration of common law principles incorporated into a comparative system, and it is better to check and state precisely the portion of the act bearing upon the matter at hand than to guess, extrapolate, or paraphrase.

¹⁸IND. CODE § 34-4-33-2 (Supp. 1985).

¹⁹"Mitigation of damages" includes the latter concept, but "mitigation" is not limited to failure to avoid future injury. See *infra* notes 27-29 and accompanying text.

²⁰IND. CODE § 9-8-14-5 (Supp. 1985).

itself to be improper, but only attempted to limit its use. In effect, the areas of "fault" and "mitigation of damages" are declared off-limits for the defense. It quite conceivably can exist and be properly applied in circumstances where the comparative fault act is not applicable or where the purpose for raising the defense is neither to establish "fault" nor to "mitigate damages."

One area where the issue is certain to arise is in claims against a government entity. Where a government employee's tortious operation of a motor vehicle has subjected the entity to liability and the injured party has failed to employ body restraints, the seatbelt defense will be appropriately raised. The comparative fault act is expressly inapplicable to such cases.²¹ That act does not purport to change common law principles of fault, only to group several different concepts of fault and non-fault under the statute's definition of the term. Where the comparative fault act does not apply, courts are free to employ common law principles, which include violation of a safety statute. With the declaration of the seatbelt statute, the obstacles to recognition of the defense which prevented the Indiana courts from applying it in *Kavanaugh v. Butorac*²² and other cases were removed. In place of legislative silence on the matter is a clear statutory mandate to buckle up, backed by penal sanctions and declarations of public safety objectives. In a nutshell, at this level of analysis, the defense may enter the case because it will be asserted as common law fault, not as statutory "fault."

The strategy need not be limited to cases where the common law of torts is controlling. The comparative fault act and its special treatment of "fault" is also inapplicable to strict product liability actions.²³ The product liability statute governing such actions controls defenses to claims made on the theory of strict tort liability, and no exclusion of the seatbelt defense is facially apparent:

- (1) It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.
- (2) It is a defense that a cause of the physical harm is a nonforeseeable misuse of the product by the claimant or any other person. Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for

²¹*Id.* § 34-4-33-8.

²²140 Ind. App. 139, 221 N.E.2d 824 (1967).

²³IND. CODE § 34-4-33-13 (Supp. 1985).

the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

(3) It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of the physical harm.

(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.²⁴

With the enactment of the seatbelt statute, the legislature has arguably declared the nonuse of available body restraints unreasonable²⁵ as a

²⁴*Id.* § 33-1-1.5-4 (1982 & Supp. 1985).

²⁵To suggest that the legislature's restrictions on the use of evidence of violation of the statute means that it does *not* consider nonuse to be unreasonable, places one in a position of having uttered a paradox: "The legislature has 'declared' a course of conduct 'reasonable' which it punishes through penal sanctions as 'unsafe.'"

The paradox can be avoided in three ways. First, it can be denied that the seatbelt statute's limitation is a declaration of the reasonableness of nonuse, but is merely a statement of public policy that nonuse should only be sanctioned by the imposition of criminal, not civil liability. Second, it might be said that the restrictions on use of evidence of noncompliance read in connection with the exclusions and exceptions from the duty imposed, the narrow range of circumstances under which the statute may be enforced (no violation unless the vehicle is moving, enforcement officers may not stop, inspect, or detain solely to determine compliance), and the very light penalty imposed in the rare case where an enforcement action succeeds (a Class D infraction carries a maximum fine of \$25, and costs may not be imposed against one found guilty of a Class D infraction) demonstrate that the legislature did not consider the statute to be aimed at eliminating *unsafe* practices by motorists, but only as an incentive to practice *safer* motoring.

The third approach would be to say that the legislature was not responding to a perceived need for safety legislation at all, but enacted the statute for other purposes, the language being couched in terms of safety only because it is semantically difficult to pass a statute relating to safety belts without carrying the connotation that safety is the main aim.

Good evidence can be cited in support of the third argument to remove it from the realm of pure cynicism. In July of 1984, the United States Department of Transportation promulgated an amendment to Federal Motor Vehicle Safety Standard No. 208 (49 C.F.R. § 571.208) pertaining to automatic passenger restraint systems. That directive requires automobile manufacturers, in a phased-in schedule, to install restraint systems not requiring user activation on all new cars manufactured after September 1, 1989. The regulation reversed administration policy opposed to automatic restraint systems and directly responded to the United States Supreme Court's decision in *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). That case struck

matter of public policy. In a case where the claim of the plaintiff against an automobile manufacturer maintained that the automobile's manufacture or design presented a defect making it unreasonably dangerous

down the National Highway Traffic Safety Administration's rescission of Standard No. 208 on the grounds that the agency had acted arbitrarily and capriciously. The Court ordered the agency either to consider the matter further, adhere to the standard, or amend it in accordance with the opinion. 463 U.S. at 57. As part of its reconsideration, the agency included a provision in the amendment rescinding the standard if state mandatory seatbelt use laws meeting stated minimums are applicable to two-thirds of the total U.S. population by April 1, 1989. While the standard does not require any particular type of restraint system, technology currently under study includes airbag systems, a controversial concept generally opposed by the automobile manufacturing industry. As part of efforts to resist the ultimate requirement of manufacturing all automobiles with airbags, the industry has actively sought the passage of mandatory use laws. See "Buckle-up Laws Are Beginning to Spread," *The Christian Science Monitor*, Mar. 12, 1985, at 6; "States Debate Requiring Use of Belts," *N.Y. Times*, Feb. 28, 1985, at B5, col. 4. The efforts are getting results: in July of 1984, only one state had passed such legislation (New York N.Y. Veh. & Traf. § 1229-C (McKinney 1970 & Supp. 1984-85)). By the end of the year, New Jersey and Illinois had mandatory use laws on the books. At the date of this writing, thirteen states have enacted seatbelt laws, and legislation is pending in at least four other states.

One explanation for the sudden popularity of the mandatory use laws has been offered by Senator John C. Danforth of Missouri. He asserts that General Motors has exerted pressure on state legislators to pass seatbelt legislation by indicating that states who refuse to do so would fall from consideration by that company for its proposed Saturn plant, an economic prospect of many billions of dollars. (Remarks of Senator John C. Danforth, Chairman of the United States Senate Commerce Committee, before the Committee on February 21, 1985, at hearings on the National Highway Traffic Safety Administration's 1984 amendment to Standard No. 208. See "Buckle-Up Laws Are Beginning to Spread," *The Christian Science Monitor*, Mar. 12, 1985, at 6; "State Mandatory Seat Belt Laws 'Tepid, Innocuous,' Danforth Charges," *Daily Report for Executives* (BNA) No. 36, (Feb. 22, 1985) at A-21.

Now that General Motors has announced the location of that plant ("It's Official; Saturn to Tennessee," *The Indianapolis Star*, July 30, 1985, at 21, col. 2.), it may be interesting to watch for any change in the rate of passage of seatbelt legislation. In Tennessee, the senate approved seatbelt legislation, but on May 15, 1985, the house of representatives failed to pass the bill by the necessary majority. Whether or not Danforth's charges are true, it is clear that the Saturn plant was on the minds of Indiana legislators and administrators during the session in which the seatbelt statute was enacted ("Senator Reconsiders Seat-belt Bill," *The Indianapolis Star*, March 19, 1985, at 1, col. 1.), and it may well be that the statute was considered as "Saturn-bait" without pressure from General Motors. In addition, the city of Richmond, Indiana, is reportedly under consideration by Chrysler Motors as a site for its joint venture with Mitsubishi. ("Mitsubishi Considering Lafayette, Richmond," *The Indianapolis Star*, June 19, 1985, at 24, col. 5). Chrysler chairman Lee Iacocca, an outspoken opponent of airbag legislation, reportedly urged the passage of seatbelt legislation in Illinois as a measure to "forestall the mandatory use of air bags." See *N.Y. Times*, *supra*, quoting Governor James Thompson of Illinois concerning his conversation with Mr. Iacocca and the Governor's assessment of the purpose of the conversation.

The statute does not even satisfy the minimum criteria of the National Traffic Highway Safety Administration rule. Those criteria are specifically stated in 49 C.F.R. § 571.028, and provide, in pertinent part:

in collisions, for example, the manufacturer might well invoke subsection one above to argue that driving or riding in the vehicle while refusing to use body restraints was an unreasonable use if it can otherwise establish that the plaintiff "discovered the defect and was aware of the danger." Even where the "discovery and awareness" clause presents a difficulty, the manufacturer might argue that subsection two bars recovery because the nonuse of the restraints was an unforeseeable misuse of the product regardless of the plaintiff's ignorance of the dangerous defect. Given the statutory mandate to wear the safety devices, backed up by criminal sanctions, the manufacturer could well maintain that it was not bound to foresee that reasonably prudent people would ignore both the provided safety measure and the command to wear them. The legislature has spelled out the exceptions to required use, and if those exceptions are taken to be the only areas of reasonable nonuse, the seatbelt defense may well be applicable in such a lawsuit. Subsection three might be raised in defense if the plaintiff had "modified or altered" the vehicle by removing, changing, or otherwise rendering the seatbelts inoperable.²⁶

B. *The Seatbelt Defense and Damages*

Whatever the precise form the defense may take, however, if it was raised for the purpose of *reducing* the plaintiff's recovery rather than barring it altogether, the seatbelt law's limitations will not have been escaped. Recall that the enactment provides that "[e]vidence of the failure to comply with this chapter may not be admitted in *any* civil

§ 4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

* * *

(c) Provide for the following enforcement measures:

- (1) A penalty of not less than \$25.00 [which may include court costs] for each occupant of a car who violates the belt usage requirement.
- (2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

Issues of federal administrative rules dictating state law aside, with such blatant nonadherence to the rule's criteria, the sincerity of the General Assembly in passing a true safety statute is validly called into question. The statute is virtually unenforceable, and even if it should come to pass that some unfortunate soul is found to be in violation of the narrow prescriptive duty, the penalty applicable is less than for jaywalking and failure to signal a turn. (Jaywalking and failure to signal are Class C infractions which carry a penalty of up to \$500.00. IND. CODE §§ 9-4-1-86, 9-4-1-88, 9-4-1-79, 9-4-1-127.1(b) (1982)).

²⁶In the early days of federal legislation pertinent to seatbelts during which the seatbelts were coupled with an audible warning device and ignition systems, some users would buckle the belts across or under the seats to prevent the noise and allow the auto to be started. Such a practice, if it were the case, might be considered "modification or alteration" under subsection (3) above.

action to *mitigate* damages.”²⁷ Here the difference between a negligence action at common law and a proceeding subject to the comparative fault act becomes crucial. The comparative fault act replaces the total bar of contributory negligence with a principle of apportionment of damages only in cases where it is properly invoked. It did not totally replace or abolish the common law of negligence in any respect. In ordinary negligence actions, the defense will have been admitted for the purpose of completely barring recovery rather than merely reducing it.

Even where the comparative fault act does apply, sufficient room exists in the seatbelt statute’s limiting language for admitting the defense. Fault and injury are not the sum total of a plaintiff’s *prima facie* case in negligence, and if the defendant attacks that *prima facie* case on some other element, the limitations are not called into play. Careful adherence to the concept of “mitigation” is important here. So long as the defensive theory is that the plaintiff’s injuries would not have occurred at all had body restraints been worn, the defense is a denial of liability, not an attempt to reduce damages. But if the defensive theory is that the injuries would not have been *as severe* as alleged had the safety devices been used, the theory will have been injected into the case for the purpose of reducing the defendant’s accountability. The legislature has implied that the defense is an all or nothing proposition, and if the nonuse of restraints can only account for a portion of the plaintiff’s harm, the defense would be inadmissible under section five of the seatbelt law.

The legal meaning of mitigation of damages is the key to understanding the different treatment of the two defensive strategies. When the defendant seeks mitigation of damages, the issue of liability technically is no longer contested. Instead, the defensive tactic focuses upon aspects of the case which will cause the jury literally to “soften”²⁸ imposition of a damages award on the defendant. The trier of fact is presented with evidence which the defendant hopes will prove one or more of three things: (1) the plaintiff’s act or omission actually caused the injury to worsen, and a reasonably prudent person would have taken measures to prevent the aggravation; (2) the defendant’s act or omission conferred a benefit upon the plaintiff as well as injury, and that benefit should be taken into account in the assessment of damages; (3) the defendant’s act or omission was not as blameworthy as the plaintiff’s case presents it.²⁹ In each, the plaintiff is assumed to have established some right of

²⁷IND. CODE § 9-8-14-5 (Supp. 1985) (emphasis supplied).

²⁸The Latin derivation of “mitigate” is *mitigatus*, to soften. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1447 (1961); FUNK AND WAGNALL’S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1590 (1963); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 918 (1971).

²⁹BALLENTINE’S LAW DICTIONARY 808 (3d ed. 1969).

recovery. But also in each, the tortfeasor hopes to soften the jury's verdict by presenting evidence that would tend to prove that the plaintiff should not receive as much as the facts would justify without the mitigating circumstances.³⁰ The mitigation defense is in the nature of confession and avoidance; liability is uncontested, but the accountability for that liability becomes the main issue.

In contrast, the defensive tactic which sets up the failure to use available safety devices as the entire cause of the injury is in the nature of a denial defense. Liability is the central issue and the defense contests it by attacking an essential element in the plaintiff's *prima facie* case. The defendant is not attempting to soften an inevitable plaintiff's verdict; he is attempting to win a verdict of no liability for himself.

In this light, it can be seen that a defendant who attempts to show that nonuse entirely caused the plaintiff's injuries may argue that the seatbelt law does not bar the defense regardless of the plaintiff's theory or the status of the parties. Causation, after all, is not equivalent to fault, and has been kept conceptually separate from the comparative fault act's treatment of "fault" despite the necessary close interrelatedness of the two terms.³¹ If a defendant seeks to defeat liability on the theory that his own conduct was not the cause of the plaintiff's injury, it does not matter whether that other conduct is faulty or innocent.³² The comparative fault act's modification of the common law of negligence is for the purpose of apportioning damages commensurate to the degrees of "fault" attributable to the various actors involved. It does not purport to modify the common law of causation. A defendant employing the theory here contemplated would not be seeking apportionment of damages by trying to establish the plaintiff's contribution of "fault" but would rather be addressing the defense to plaintiff's *prima facie* case. If the theory is valid, it means that neither the comparative fault act nor the seatbelt statute affects the defense as it is here posed.

³⁰BLACK'S LAW DICTIONARY 904 (5th ed. 1979).

³¹The definition of "fault" does not include an element of causation. IND. CODE § 34-4-33-2 (Supp. 1985). The "legal requirements of causal relation" are to be applied to "fault" by virtue of a separate section of the act. *Id.* § 34-4-33-1. And, if that "fault contribut[es] to cause the claimant's loss," *id.* § 34-4-33-5(a), (b), or if the claimant's "fault" combines with defendant's to "cause the claimant's death, injury or property damage," *id.*, the jury may apportion damages accordingly.

³²This assertion is valid only as a special proposition. It is not pertinent to situations where the defendant seeks to avoid liability by proving that multiple factors caused the injury. Where the defendant's acts can fairly be taken as a producing cause of the injury, courts do not generally permit plaintiff's cause of action to be defeated simply upon proof that other forces combined with the defendant's conduct to produce the harm. *See, e.g.,* Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 211 N.W. 913 (1927) (a favorite of torts teachers and textbook writers). RESTATEMENT (SECOND) OF TORTS § 432 (1965); Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941 (1935). In joint tort situations, defendants do not escape liability by pointing accusing fingers at each other. RESTATEMENT

Two difficulties with this approach to the seatbelt defense exist. First, it is effective only in *some* circumstances where *all* of the plaintiff's injuries have been caused by the failure to wear safety belts, and second, even if admitted upon the grounds that it explains all of the plaintiff's injuries, unless the jury is carefully instructed about its applicability and the jury adheres to the instruction, it may be given effect contrary to the statute's limitations.

It is important to recall and emphasize the statutory limitations upon the defense at this stage of analysis. The statute prevents the introduction of evidence of failure to employ safety belts for the purposes of establishing "fault" or to "mitigate damages."³³ This means that if the defendant proffers the evidence upon the strategy that it was plaintiff's "fault" and not the defendant's that caused the injury, the evidence is technically inadmissible under the statute. Likewise, the prohibition against admission for purposes of mitigation prevents the defendant from asserting directly or indirectly that the failure to wear safety belts should reduce the plaintiff's recovery, regardless of whether the omission technically satisfies the statutory definition of "fault." The latter prohibition presents some interesting issues concerning the propriety of jury conduct which will be discussed in greater detail later,³⁴ but for now the problem can be stated as a lack of direct control over jury treatment of evidence of violation of the seatbelt statute.

Because the statute's prohibitions are specifically stated and prevent admission for "mitigation" and treatment as "fault," the prohibitions carry the implications that evidence of the violation may be *admitted* for purposes *other* than mitigation and *may* be treated as *other* than

(SECOND) OF TORTS §§ 875-876 (1979). Some successive or concurrent tort situations are treated as if they were joint torts and to the same effect. See *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944); *Kingston*, 191 Wis. 610, 211 N.W. 913 (1927); RESTATEMENT (SECOND) OF TORTS § 879 (1979). Intervening and superseding cause doctrine requires the defendant to prove that the responsible cause was not within the scope of duty, and in some instance the culpability of the other causal agent may have an important bearing upon the issue. E.g., *Watson v. Kentucky & Indiana Bridge & Ry. Co.*, 137 Ky. 619, 126 S.W. 146 (1910); RESTATEMENT (SECOND) OF TORTS § 442 (1965). In contributory negligence situations, of course, the faultiness of the plaintiff's conduct is of crucial importance. RESTATEMENT (SECOND) OF TORTS §§ 463, 469 (1965). Against this background, the causation theory here being explored has utility only in the narrow range of circumstances where the defendant seeks to prove that no injury at all would have occurred without the plaintiff's act. Pragmatically, this means that the theory is arguable only in cases where the defendant can establish that the failure to wear seatbelts was *the* factual cause of the accident which ultimately produced the injury, because it will be exceedingly rare where the defendant's conduct did not produce some minimal kind of harm. Once the threshold of "some harm" is breached, the defendant becomes subject to the prohibition upon mitigation in the statute and the general common law proposition that defendants take their plaintiffs as they find them. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

³³IND. CODE § 9-8-14-4 (Supp. 1985).

³⁴See *infra* notes 35-39 and accompanying text.

"fault." Furthermore, the statute does not in any way directly affect the jury's power to decide the issue of damages, so a question exists whether the jury may mitigate damages for failure to buckle up when the evidence of that failure has otherwise been properly admitted.

IV. EVIDENTIARY PROBLEMS AND THE JURY

The legislature's approach and the issues which lurk in the language of that approach spawn the need to consider proffers of evidence of omissions of the safety precaution with great care. The evidence should be allowed if, but only if, it is clear that safety belts were not used and the defendant proposes to show that his conduct did not produce the injury and that the conduct of the plaintiff did produce it. Furthermore, even where those preconditions are satisfied, the jury should be instructed that it is not to consider the evidence as proof of the plaintiff's "fault," or as reason to reduce damages, but only as proof that the defendant did not cause the injuries. In the abstract, a jury faced with such a defense is capable of producing one of three possible verdicts: (1) defendant alone caused the injury (thereby completely rejecting the defendant's evidence); (2) plaintiff alone caused the injury (thereby completely accepting defendant's evidence); or (3) defendant and plaintiff together produced the injury (thereby partially accepting and partially rejecting defendant's evidence). Upon verdicts (1) and (3), any reduction of damages, whether one or one hundred percent, would technically amount to "mitigation" and would therefore pose the issue of whether such mitigation is proper under the statute. Arguments in support of mitigation would take the form that the statutory prohibition is upon admissibility for purposes of mitigation only; evidentiary principles permit its admission for other purposes; and the jury's power to mitigate damages is undiminished by the prohibition. Opposition arguments would take the form that clear public policy has been stated that a motorist's failure to use a seatbelt is not to be considered a basis for impairing an injured party's right of recovery; that even though the jury's power to mitigate has not been directly impaired by the statute, it may do so only upon competent evidence; and the competency of seatbelt nonuse evidence for purposes of mitigation has been abrogated.³⁵

Principles of *proximate* cause may blur the conceptual picture here somewhat, because a jury may well find that although the defendant and the plaintiff both contributed to the injury, only one or the other

³⁵See generally MCCORMICK ON EVIDENCE 151 (3d ed. 1984), citing 1 WIGMORE, EVIDENCE § 13 at 693 (Tiller rev. 1983). Commentary in Wigmore's treatise seems to support the latter argument, but at the same time it expresses the view that the main line of protection against jury misuse is the limited form of admonition in the instructions. *Id.*

was the proximate cause. The scope of this comment does not permit a full exposition of proximate cause theory, but it may help to think of proximate cause as "legal cause." Against a background of cause and effect relationship between both parties' conduct and the injury, with a finding that the plaintiff (or the defendant) is the "legal cause" of the injury, the jury has declared that even though a connection can be established within the laws of physics between the act of the opposite party and the event of injury, the connection may not be made within the law of torts. Conceptually then, the finding fits either verdict (1) or verdict (2) above. If it fits verdict (2), the defendant has defeated the plaintiff's *prima facie* case, and the "faultiness" of the plaintiff's causal act is logically unrelated to the determination of the controversy. It is not one hundred percent "mitigation" because it does not simply amount to a reduction of damages that the plaintiff would otherwise be entitled to recover.³⁶

Assuming proper admission of evidence of the plaintiff's failure to wear a safety belt and jury instructions which explain the proper effect of its findings in regard to that evidence, the possibility remains that through misunderstanding or misconduct, the jury will reduce the plaintiff's award. In the three ways in which such a result can be reached, one is easily detectable and corrected; the other two are not.

One way a jury may err in this respect is to ignore or misconstrue judicial admonitions not to consider the failure to wear the device as "fault." So doing, the jury may decide that plaintiff's failure constituted "fault" of a certain percentage and reduce damages in proportion to that "fault." Because the jury is required to render verdicts pursuant to the comparative fault act's specifications of form, that error will show up in the jury's answers to the questions put to it concerning the amount of damages prior to reduction for "fault" and the percentages of "fault" assigned to each party.³⁷ Although the comparative fault act does not specifically address the corrective action to be taken when the verdict form indicates an inconsistency with the seatbelt statute's limi-

³⁶A hypothetical case may serve to illustrate the idea being presented here. The defendant (D), through its agents, was operating its train at a speed in excess of the posted limit as the train approached the intersection with the highway upon which the plaintiff (P) was travelling. P swerved his automobile upon seeing the train appear suddenly in his path. His maneuver caused him to collide with the crossing warning device and his car flipped over. P was not wearing a seatbelt at the time and was thrown from the vehicle as it flipped over. He was thrown under the wheels of the moving train and seriously injured. In the realm of cause and effect, D's conduct was related to P's, and is properly considered as combining with P's to produce the injury. In the realm of "legal cause," however, the liability of D will depend upon whether its conduct was within the scope of its duty to proceed at the posted speed. A jury could properly decide that D's speeding was not the legally responsible cause of P's injury.

³⁷IND. CODE § 34-4-33-6 (Supp. 1985) requires the court to "furnish to the jury forms

tations,³⁸ such an error would clearly invoke the basis for a motion to correct error pursuant to Indiana Trial Rule 59(A)(8). If no other evidence was presented in the case pertinent to the plaintiff's "fault," a declaration by the jury that plaintiff contributed a certain percentage of "fault" would be incontrovertible evidence of jury error. It would be a relatively simple matter to establish "[t]he verdict or decision being contrary to law specifically pointing out the insufficiency or defect."³⁹

If the defendant has attempted to show that the plaintiff was at "fault" for reasons other than the failure to wear the safety belt, a jury error of the sort just described is far more difficult to detect and correct. Given the wide discretion afforded to juries by tort law generally and the comparative fault act in particular, considerable room exists for the jury to employ loosely the definition of "fault." Add to that the absence of any real standard by which to determine *percentages* of "fault" objectively or to test jury declarations of the percentages, and an attribution of "fault" to the plaintiff might well easily conceal a jury's decision to count the failure to use seatbelts as culpable conduct.

Another way the error might occur would be when a jury, although it adheres to the instructions concerning the relationship of the defense to issues of "fault," simply awards less than full damages in the belief that the plaintiff does not "deserve" to recover fully. Such a verdict would contravene the seatbelt statute, not so much because it mitigates damages, but because the jury will have treated the plaintiff's omission tantamount to "fault." The error will be especially difficult to detect because the jury is not bound to value the injury in the same manner or amount as the plaintiff, and plaintiffs often consider their damages to be much higher than the ultimate award. Unless the jury's reduction is of sufficient magnitude to induce counsel and court to apply trial rule 59 to correct the verdict on the ground of "inadequate damages," the error may defy correction.

of verdicts that require the disclosure of: (1) the percentage of fault charged against each party; (2) the calculations made by the jury to arrive at their final verdict."

³⁸IND. CODE § 34-4-33-9 (Supp. 1985) provides:

In actions brought under this chapter, whenever a jury returns verdicts in which the ultimate amounts awarded are inconsistent with its determinations of total damages and percentages of fault, the trial court shall:

- (1) inform the jury of such inconsistencies;
- (2) order them to resume deliberations to correct the inconsistencies; and
- (3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

In the case here contemplated, the verdict's "ultimate amounts awarded" and the "determinations of total damage and percentages of fault" would not be "inconsistent." However, such a verdict would be applying the comparative fault act under circumstances which would not warrant a finding of "fault" and in a way that the legislature clearly declared improper.

³⁹IND. R. TR. P. 59(A)(8).

V. CONCLUSION

Because the legislature has spoken with such specificity in limiting the use of evidence of violation of the seatbelt statute in automobile accident cases, leeway remains in the margin of cases where those specific limitations are not invoked to hold plaintiffs accountable for their failure to use the safety devices. It is important to observe in closing that the common law of Indiana has yet to recognize the seatbelt defense. This Article has identified some situations where the defense may be raised in light of the language chosen by the General Assembly and has discussed the issues that will arise when the defense is proposed. One important justification for rejecting the defense articulated by some courts has been that the added delay and expense accompanying proof of the omission to wear body restraints and the contribution to the plaintiff's injury do not warrant its introduction into the case.⁴⁰ To those direct costs must now be added the indirect costs of complication and potential for error which reside in the type of case which falls outside the legislative limitations on the defense. With that observation, prognostication about the ultimate recognition of the seatbelt defense at common law in Indiana should be cautious. Given that the seatbelt statute does not take effect until July of 1987, and that some developments will have occurred in other jurisdictions which may be of interest to the Indiana General Assembly as well as Indiana courts, caution demands that this Article close by saying simply: it's too early to tell.

⁴⁰*E.g.*, *Franklin v. Gibson*, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983); *Derheim v. N. Fiorito Co.*, 80 Wash. 2d 161, 492 P.2d 1030 (1972).

